STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

Open Government Information and Data Re-use Project

Suggested All-of-government Approach to Licensing of Public Sector Copyright Works: Discussion Paper for Public Service and Non-Public Service Departments

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Executive Summary

Introduction

1 This Discussion Paper is the second stage of what is expected to be a multi-stage delivery of the State Services Commission's Open Government Information and Data Re-Use Project ("the Project"). It builds upon the Background Paper released in December 2008[1] and suggests and seeks feedback on an all-of-government approach to licensing of public sector copyright works.

Context

2 The context in which the Project is taking place is three-fold:

(a) the legal context of copyright (Crown copyright and otherwise) in qualifying public sector works;

(b) the policy context of both the Policy Framework for Government-Held Information (1997)[2] and the New Zealand Government Web Standards and Recommendations (March 2007);[3] and

(c) the factual context of existing licensing practices across the State Services.

3 Full appreciation of the rationale for the Project requires an understanding of that context, which – in essence – is as follows:

(a) as regards the legal context:

(i) copyright is a property right that exists in certain original works, regulated by the Copyright Act 1994;

(ii) Crown copyright is a species of copyright as set out in section 26 of that Act;

(iii) "Crown" for Copyright Act purposes means Her Majesty the Queen in right of New Zealand and includes a Minister of the Crown, a government department, and an Office of Parliament; it does not include Crown entities or State owned enterprises; their original works are subject to what one might call regular copyright;

(iv) while copyright (Crown or regular) exists in most public sector original works, the Act provides that no copyright exists in certain governmental and Parliamentary materials, such as legislation, court judgments and Parliamentary debates; and

(v) it is important to distinguish between copyright in original works and licensing of works in which copyright exists, a distinction which sometimes is not appreciated;

(b) as regards the policy context, both the Policy Framework for Government-Held Information and the Web Standards have something to say about access to and use of public sector copyright material, but they are generic and have their limits; and

(c) as regards the factual context, there are at least three broad categories of licensing currently in place across government, from one-off bespoke licence agreements to

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1 "Promoting Government Information and Data Re-Use: Background Paper" (December 2008), available at http://www.e.govt.nz/policy/information-data/background.

2 http://www.e.govt.nz/policy/information-data/framework.html

3 http://www.e.govt.nz/archive/standards/web-guidelines/web-standards-v1.0

open-ended and often loosely-worded arrangements, with each category being likely to house multiple variants.

Rationale

4 There are at least six drivers behind the Project, some flowing from the policy and factual context, others not. Those drivers are:

(a) current confusion, uncertainty and criticism on the part of members of the public around Crown copyright and licensing, including difficulties being experienced through the various and inconsistent licensing practices across the State Services;

(b) recognition that, although the Policy Framework for Government-Held Information and the Web Standards set admirable principles and expectations regarding access to and licensing of public sector information and data, they are no longer adequate to deal with the tapestry of copyright and licensing issues that arise in the digital age;

(c) increasing interest on the part of certain New Zealand government agencies in the potential use of Creative Commons licences;

(d) notable public sector information initiatives across the State Services;

(e) international developments regarding the use and valuable exploitation of public sector information and data, including automated re-use; and

(f) the current economic climate.

5 While each of those drivers is important in its own right, significant attention is paid in this Discussion Paper to international developments within:

(a) the European Union and the United Kingdom in particular;

(b) the Organisation for Economic and Co-operation Development; and

(c) Australia, at both state and federal levels.

The reason for doing so is that New Zealand can learn a great deal from, and leverage off, the considerable work and thinking already undertaken by these bodies and jurisdictions. Developments in Queensland, Victoria and the United Kingdom are particularly noteworthy. The Commission acknowledges the considerable assistance it has obtained from a review of their work.

6 The review of international developments reveals that:

(a) there is considerable activity at supra-national, national and state levels on issues of public sector information and data re-use;

(b) heightened activity in recent times appears to be due, in part, to advances in technology and a growing body of economic research pointing to the advantages to be gained from open access to, and re-use of, public sector information and data; and

(c) there is generally widespread support at these supra-national, national and state levels for increasing the release of public sector copyright material on liberal terms and in formats that permit and readily enable public use and re-use of that material.

Preliminary view

7 Analysis of the six drivers behind the Project suggests that there is solid collective reason for the Government to advocate all-of-government adoption of a suite of open content

licences for public sector copyright material where it is appropriate for such material to be made available for re-use.

8 The Commission's preliminary view is that the suite of Creative Commons New Zealand law licences represents the most obvious candidate for potential governmental adoption, possibly in conjunction with one or more additional restrictive licences and/or indigenous licences to deal with situations for which the Creative Commons model is not appropriate.

9 That preliminary view is based on consideration of each of the six Creative Commons licences and analysis of the following specific issues:

(a) whether the licence choices cater for a sufficiently diverse range of circumstances in which government agencies may wish to licence copyright material on varying "open access" terms, including where agencies may wish to recover a statutory charge or other licence fee for licensed provision of the material;

(b) whether the licences provide the Crown or other public sector bodies with sufficient protection from liability;

(c) whether use of Creative Commons licences would give rise to an implied indemnity under Part 8 of the Copyright Act or to any other issues under or related to that Part, including whether governmental adoption of Creative Commons or other standard licences would conflict with the current practices of copyright licensing schemes in New Zealand;

(d) whether the licences are sufficiently clear and self-explanatory in their terms to encourage uptake and, if not, whether any particular legal issues ought to be explained in accompanying guidance; and

(e) whether any of the licences might be considered inconsistent with any legislation.

10 In essence, the answers to these issues are as follows:

(a) the six licences do cater for a wide range of circumstances in which agencies may wish to licence their copyright material; while it is difficult to foresee all possible circumstances in which agencies may wish to licence their copyright material, officials' preliminary view is that the various combinations of licensing terms offered by the Creative Commons licences are likely to accommodate the vast majority of circumstances; whether there is a need for one or more additional restrictive licences is one of the issues on which the Commission seeks feedback;

(b) the Creative Commons licences are considered to provide agencies with sufficient protection from liability;

(c) use of Creative Commons licences by government is not expected to give rise to any issues under Part 8 of the Copyright Act; such use is also not expected to conflict with the current practices of copyright licensing schemes in New Zealand because, as far as the Commission is aware, there is no pan-Crown or all-of-government arrangement in place with any copyright licensing scheme or body by which the Crown or wider State Services agencies collectively authorise the inclusion of Crown and other governmental works within the publication lists covered by the licences such bodies make available to the public;

(d) the Creative Commons licences are considered to be sufficiently clear and self-explanatory to encourage uptake, in conjunction with accompanying guidance material which would focus on their use in a public sector context; and

(e) a legal review has revealed no inconsistency between the use of Creative Commons licences and New Zealand legislation that is of general application to agencies, most notably the Official Information Act 1982 and the Public Records Act 2005.

11 As regards whether the use of Creative Commons licences would alleviate the confusion and criticisms around Crown copyright and current governmental licensing regimes, it is considered that adoption by government of the Creative Commons licenses:

(a) is likely to bring greater clarity and consistency of approach to the licensing of governmental copyright material; but

(b) is not likely, of itself, to address the confusions around Crown copyright and licensing.

12 The solution for the latter is considered to be the promulgation and release by the Commission of appropriate guidance material which explains, among other things, the nature of Crown copyright and regular copyright, those categories of public sector information which are not subject to copyright protection, and the key differences between the existence of copyright in material and the licensing of such material.

Suggested approach

13 In the light of the analysis and preliminary conclusions set out in this Discussion Paper, the Commission suggests the following all-of-government approach to opening up public sector copyright material for re-use:

(a) development and promulgation by the Commission of a New Zealand Government Information Licensing Framework ("NZGILF") which would build and expand upon elements of this Discussion Paper; in conjunction with

(b) development and promulgation by the Commission of an "NZGILF Toolkit", to assist agencies with matters of implementation.

14 As regards the nature and scope of the NZGILF and NZGILF Toolkit, the Commission's preliminary view is that they would:

(a) be recommendatory and normative in nature, rather than mandatory; and

(b) apply not only to departments but to the wider State Services.

Feedback

15 The Commission recognises that:

(a) further input from State Services agencies is required before further development of an NZGILF and NZGILF Toolkit, to ensure that their interests and any concerns they may have are taken fully into account; and

(b) there is potentially considerable value and learning to be obtained from various communities of interest within New Zealand as to the issues they face regarding the re-use of public sector copyright material, including the formats in which they would like to see it made available and the impact that various charging models might have on their ability to re-use that material.

16 Accordingly, the Commission seeks feedback from State Services agencies and the public on the content of this Discussion Paper. As a first step, the Commission is seeking feedback from public service and non-public service departments. The Commission would appreciate detailed responses to the questions set out at the back of the Discussion Paper as well as any general comments that agencies may wish to make.

17 A subsequent consultation process is planned to obtain the views of both wider State Services agencies and the public.

Consultation timeline

18 A four week period has been set for departmental feedback. It is expected that this time will be required for legal and policy advisors to give serious consideration to the questions. The deadline for providing feedback is **24 April 2009.**

19 When providing feedback, please state:

(a) the name of your department; and

(b) phone and email contact details to enable Commission officials to raise any follow-up questions they may have.

A template Microsoft Word document has been provided with this Discussion Paper to assist departments in their provision of feedback.

20 Please forward feedback to [redacted].

Legal Context

The nature of copyright[4]

21 The law of copyright in New Zealand is contained principally in the Copyright Act 1994. The following paragraphs provide a brief introduction to the nature of copyright.

22 Copyright is a property right that exists in certain original works. To be protected, the original works must come within one or more of the following categories:[5]

(a) literary, dramatic, musical, or artistic works;

(b) sound recordings;

(c) films;

(d) communication works; or

(e) typographical arrangements of published editions.

23 The Copyright Act's definition of "literary work" includes a "table or compilation", and the definition of "compilation" includes "a compilation consisting wholly of works or parts of works, a compilation consisting partly of works or parts of works, and a compilation of data other than works or parts of works".[6] It follows that certain datasets and databases can, in principle, qualify as literary works.[7]

24 Only the owner of the copyright in a work may do the following in New Zealand regarding that work:

(a) copy it;

(b) issue copies to the public whether by sale or otherwise;

(c) perform, play or show it in public;

(d) communicate the work to the public;

(e) make an adaptation of it; or

(f) do any of the foregoing in relation to an adaptation.

25 These exclusive rights are subject to statutorily permitted acts and the grant of copyright licences.

Crown copyright as a species of copyright

26 Crown copyright is a species of copyright regulated principally by section 26 of the Copyright Act.[8] That section states that:

(a) where a work is made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services, the work qualifies for copyright and the Crown is the first owner of any copyright in the work, unless the parties to the contract agree otherwise (subsections (1) and (6));

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4 See, e.g., *The Laws of New Zealand,* Intellectual Property: Copyright, paras 1-7 (LexisNexis, online service); and the website of the Intellectual Property Office of New Zealand at http://www.iponz.govt.nz/cms/copyright

5 Section 14(1) of the Copyright Act 1994, as amended by the Copyright (New Technologies) Amendment Act 2008.

6 Section 2(1) of the Copyright Act 1994.

7 Detailed discussion of this important issue is beyond the scope of this Discussion Paper. See, e.g., S Frankel and G McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, Wellington, 2002) pp. 171-173 and 624-633; I Finch (Ed) *James & Wells Intellectual Property Law in New Zealand* (Thomson Brookers, Wellington, 2007) pp. 186-188.

8 http://legislation.govt.nz/act/public/1994/0143/latest/DLM345937.html

(b) copyright in such a work is referred to as "Crown copyright", even if such copyright is assigned to another person (subsection (2));

(c) Crown copyright expires:

(i) in the case of a typographical arrangement of a published edition, at the end of the period of 25 years from the end of the calendar year in which the work is made; or

(ii) in the case of any other work, at the end of the period of 100 years from the end of the calendar year in which the work is made (subsection (3));

(d) in the case of a work of joint authorship where one or more, but not all, of the authors are persons employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services, the section applies only in relation to those authors and the copyright existing by virtue of their contribution to the work (subsection (4)).

27 "Crown" for these purposes is defined in section 2 of the Act to mean Her Majesty the Queen in right of New Zealand and includes a Minister of the Crown, a government department, and an Office of Parliament. It expressly does not include a Crown entity or a State enterprise named in Schedule 1 to the State-Owned Enterprises Act 1986. As such, while Crown entities and State owned enterprises ("SOEs") do enjoy copyright in their works, their copyright is not "Crown copyright".

Specific public sector works in which there is no copyright

28 Section 27(1) of the Copyright Act contains a list of governmental and Parliamentary materials in which no copyright exists. In essence, no copyright exists in Bills, Acts, regulations, bylaws, NZ Parliamentary debates, select committee reports laid before the House, court and tribunal judgments, and reports of Royal commissions, commissions of inquiry, ministerial inquiries, or statutory inquiries.

29 Section 27(1A) goes on to state that no Crown copyright exists in any work, whenever that work was made:

(a) in which the Crown copyright has not been assigned to another person; and

(b) that is incorporated by reference in a work referred to in subsection (1) (that is, those works referred to in paragraph 28 above).

Section 27(1B) states that, except as specified in subsection (1A), nothing in subsection (1) affects copyright in any work that is incorporated by reference in a work referred to in subsection (1).

30 In substance, the effect of subsections (1A) and (1B) is two-fold:[9]

(a) to strip existing and non-assigned Crown copyright from any work that is incorporated by reference into one of the works referred to in subsection (1); and

(b) to ensure that third party copyright in works that are incorporated by reference into any of the works referred to in paragraph 28 is not overridden by section 27(1).

Crown copyright and licensing

31 It is not uncommon for those not familiar with copyright law to confuse the distinction between Crown copyright and the licensing of material in which Crown copyright exists. That is so irrespective of the form that the licensing takes, but has most recently been noticed in discussions around Creative Commons licensing of Crown copyright material (discussed further below).

32 The key point is that Crown copyright in content and licenses to use such content are conceptually distinct things. One way of conceptualising the distinction is to think of "Crown copyright", like any form of copyright, as a bundle of rights, some of which can, at the election of the copyright owner, be shared with others by way of various licence arrangements, whether that be a one-off, bespoke license, or a uniform licence such as those offered by Creative Commons.

33 If, metaphorically, Crown copyright in a work were an apple, a licence relating to that work would (usually) be a slice of it. The size of the slice (corresponding to the degree of uses to which the work could be put and whether the licence is exclusive or non-exclusive) depends on the nature of the licence granted.

Policy Context

The Policy Framework for Government-held Information (PFGHI)

34 In 1997, and with the agreement of Cabinet, the State Services Commission released the Policy Framework for Government-Held Information.[10] That Framework applies to departments and consists of 11 principles, addressing availability, coverage, pricing, ownership, stewardship, collection, copyright, preservation, quality, integrity and privacy.

35 The principles most relevant to this Discussion Paper are the principles of availability and copyright:

> "*Availability*
>
> Government departments should make information available easily, widely and equitably to the people of New Zealand (except where reasons preclude such availability as specified in legislation).
>
> …

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9 See further the Legislation (Incorporation by Reference) Bill (250-1) (30 March 2005) as reported by the Government Administration Committee, at http://www.parliament.nz/NR/rdonlyres/3DFA2143-5189-4C90-972C-0A5EA2CD6005/48100/DBSCH_SCR_3038_31391.pdf; the Hon Pete Hodgson's comments during the second reading of the Bill, at http://www.hansard.parliament.govt.nz/hansard/Final/FINAL_2005_04_12.htm; and G McLay *Strategy and Intellectual Property – Scoping the Legal Issues* (NZ Digital Content Strategy Working Paper 2, April 2006) pp. 44-46, at http://www.parliament.nz/NR/rdonlyres/E795AA07-4CB0-4A5B-806E-976A60A2E2D9/63800/StrategyandintellectualpropertyMcLay3.pdf

10 http://www.e.govt.nz/policy/information-data/framework.html

Copyright

Information created by departments is subject to Crown copyright. Where wide dissemination is desirable, the Crown should permit use of its copyrights subject to acknowledgement of source."

36 It is evident that the Government:

(a) through the "Availability" principle, was setting a normative expectation of information availability flowing from the interests of transparency and democratic participation; and

(b) through the "Copyright" principle, was setting a normative expectation that, where wide dissemination is desirable, "the Crown should permit use of its copyrights subject to acknowledgement of source".

37 Through the "Coverage" principle, the Government also anticipated a digital environment:

"*Coverage*

Government departments should make the following information increasingly available on an electronic basis:

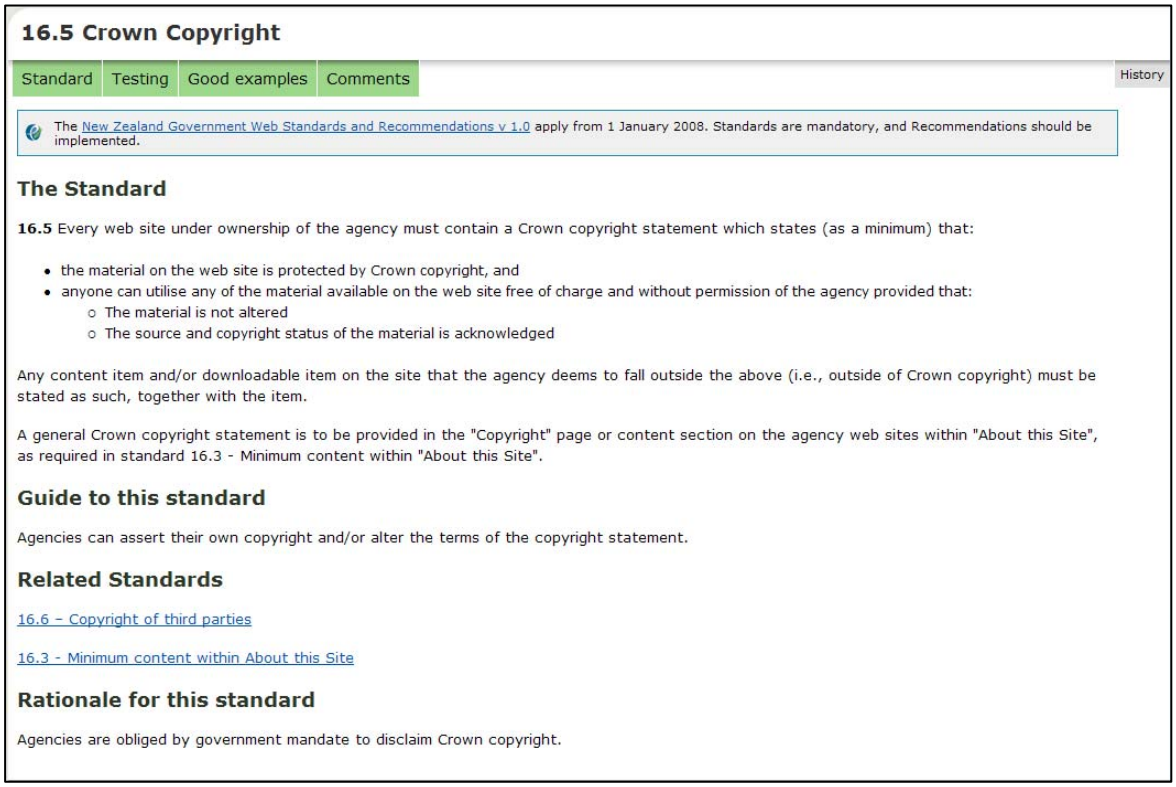
- all published material or material already in the public domain
- all policies that could be released publicly
- all information created or collected on a statutory basis (subject to commercial sensitivity and privacy considerations)
- all documents that the public may be required to complete, and
- corporate documentation in which the public would be interested."

New Zealand Government Web Standards and Recommendations

38 Open-ended licence arrangements pursuant to which specified copyright material may be used by anyone, usually subject to certain simple conditions, are commonly found on governmental websites whose copyright terms reflect, to varying degrees, the requirements of the Web Standards. The relevant Standard in this context is Standard 16.5 which relates to Crown copyright.[11]

[11] http://webstandards.govt.nz/index.php/Standard:16.5_Crown_Copyright

39 Standard 16.5 states as follows:



16.5 Crown Copyright

Standard | Testing | Good examples | Comments | History

The New Zealand Government Web Standards and Recommendations v 1.0 apply from 1 January 2008. Standards are mandatory, and Recommendations should be implemented.

The Standard

16.5 Every web site under ownership of the agency must contain a Crown copyright statement which states (as a minimum) that:

- the material on the web site is protected by Crown copyright, and
- anyone can utilise any of the material available on the web site free of charge and without permission of the agency provided that:
  - The material is not altered
  - The source and copyright status of the material is acknowledged

Any content item and/or downloadable item on the site that the agency deems to fall outside the above (i.e., outside of Crown copyright) must be stated as such, together with the item.

A general Crown copyright statement is to be provided in the "Copyright" page or content section on the agency web sites within "About this Site", as required in standard 16.3 - Minimum content within "About this Site".

Guide to this standard

Agencies can assert their own copyright and/or alter the terms of the copyright statement.

Related Standards

16.6 – Copyright of third parties

16.3 - Minimum content within About this Site

Rationale for this standard

Agencies are obliged by government mandate to disclaim Crown copyright.

Factual Context

40 Anecdotal evidence suggests that there are at least three broad categories of copyright licensing arrangements in place across government:

(a) one-off, bespoke licence agreements relating to specific arrangements in respect of specific content;

(b) bespoke licence agreements relating to specific arrangements in respect of specific content but made available to more than one licensee; and

(c) open-ended licence arrangements pursuant to which specified copyright material may be used by anyone, usually subject to certain simple conditions.

41 It is likely that multiple licence variants exist within each of these broad categories. It is certainly the case, for example, that multiple variants of website copyright statements exist, some limiting re-use to personal and in-house contexts, others apparently not; some requiring a specific form of attribution, some not; some prohibiting alteration or adaptation, others not; some containing clarity around permitted web feed re-use, others not; and some prohibiting use in a misleading context, others not.

Project Rationale

42 As noted above, there are at least six drivers behind the Commission undertaking the Open Government Information and Data Re-Use Project, namely:

(a) current confusion, uncertainty and criticism on the part of members of the public around Crown copyright and licensing;

(b) recognition that, although the Policy Framework for Government-Held Information and the Web Standards set admirable principles and expectations regarding access to and licensing of public sector information and data, they are no longer adequate to deal with the tapestry of copyright and licensing issues that arise in the digital age;

(c) increasing interest on the part of certain New Zealand governmental agencies in the potential use of Creative Commons licences;

(d) notable public sector information initiatives across the State Services;

(e) international developments regarding the use and valuable exploitation of public sector information and data, including automated re-use; and

(f) the current economic climate.

43 Each of these drivers is discussed below.

Confusion, uncertainty and criticism of Crown copyright and licensing

44 It is not uncommon for members of the public to misunderstand the nature and extent of Crown copyright and the distinction between Crown copyright and the licensing of Crown copyright (or regular copyright) material.

45 It is also not uncommon to find statements on the web such as this:

(a) 'the Crown Copyright license is defined within the Copyright Act (1994) and can usually be found on Government webpages';

(b) 'it's a fairly permissive license; if you're using it for non-commercial use then you can do whatever you please. Otherwise you'll need to get permission from the agency in question'.

46 In the absence of clear and user-friendly guidance from government on the nature of Crown copyright, regular copyright and copyright licensing, either at or linked to from the sources of copyright material that people may wish to re-use, such well-intentioned statements are understandable. They are attempts by non-lawyers to make sense of the policy statements that do exist, the Web Standards and the various copyright notices one finds on sites across government. They are, nevertheless, incorrect.

47 There is, in fact, no such thing as a universal "Crown copyright licence" applying to all Crown copyright works. No such licence is set out in the Copyright Act, the PFGHI or anywhere else. What one sees on many government websites is a reflection of the Web Standards but, as noted above, the relevant standard (Standard 16.5) does not prescribe a rigid statement that can never be changed. To give an example, the copyright statement on the e-government website is not a replica of Standard 16.5; rather, it goes well beyond it by prohibiting commercial use without consent and requiring a specific form of attribution.[12]

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12 http://www.e.govt.nz/legal

48 Others have noted that Crown copyright does not "allow automatic republishing without having to clarify conditions of use with the agency".[13] While that is not universally so, as in some instances the licensing terms on government websites do specify what kind of republishing may occur without the agency's consent, it often is the case, either because the licensing terms:

(a) are vague or silent on the likes of commercial use; or

(b) expressly prohibit "alteration" or "commercial use" without the agency's consent, in circumstances where the republishing and repackaging of the relevant copyright material is likely to require alteration, sometimes for understandable commercial purposes, thus requiring those wishing to republish and repackage to consult the agency concerned.

49 It has also been noted that there is inconsistency in the Crown copyright and licensing statements that appear on websites across government. As one commentator has put it:[14]

> "Crown Copyright's [sic] seem to differ in subtle and minor ways as defined by the agency that owns the information. This make[s] it difficult to say take and republish this information, say by creating a data-warehouse, because Government isn't doing this. The difficulty comes because … there is a different bundle of rights with each piece of data that Government releases, subtle differences, but time consuming to work with, particularly in aggregation."

50 For the following reasons, these remarks are well made:

(a) There is currently no government-endorsed set of licences from which agencies can pick and choose depending on the nature of the copyright material to be released and the scope of re-use to be permitted and no openly available legal guidance to assist agencies with their task beyond Web Standard 16.5.

(b) The default position, therefore, may be a conservative one or one which follows Web Standard 16.5 and is consequently vague on important issues such as commercial re-use.

(c) It not difficult to empathise with those who wish to aggregate public sector copyright material coming from different sources with different terms. Depending on the differential terms in question, they would need to:

(i) consider each source's licence terms and find common denominators among them; and

(ii) to the extent that those common denominators fall short of the proposed re-use, apply, potentially to a number of agencies, for permission.

That would, at the least, be a time-consuming process.

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13 Comment on SSC's blog, *In Development*, on 29 July 2008: http://blog.e.govt.nz/index.php/2008/07/24/what-does-web-20-mean-for-government/#comment-320

14 Comment on SSC's blog, *In Development*, on 7 August 2008: http://blog.e.govt.nz/index.php/2008/07/24/what-does-web-20-mean-for-government/#comment-329

Limitations of Policy Framework for Government-Held Information and Web Standards

Policy Framework for Government-Held Information

51 The PFGHI was released in 1997. At that time, the Internet was still very much in its infancy. While many could foresee to some extent the promise it held, it is probably fair to say that, in the intervening 11 or so years, quantum leaps have been made.

52 Today the Internet is increasingly awash with new sites and tools that are making it a considerably more interactive place than it once was. Within the last 5-7 years, the Internet has evolved from a place in which we principally consumed the content of others (added to sites by those with the technical ability to do so), into an interactive space in which we can not only read the contributions of others, but actively and usually in real-time, create sites and post our own content to them, allow others to comment on it, comment on the contributions of others, and share all manner of information and files, from text to audio to video. Publishing power is now in the hands of the many rather than the few. Further, due to comparatively new and increasing availability of certain technologies, such as web feeds[15] and APIs[16] (to name but two), huge amounts of information are no longer confined to the silos of individual websites as was once the case. Rather, web-based information is becoming increasingly transportable from site to site, application to application, and medium to medium.

53 Further, and significantly for the purposes of this Discussion Paper, we are seeing many creative and value-adding uses of various types of information and datasets. Existing datasets are being "mashed up" with other datasets, either existing or created, to produce both economic opportunity and novel applications and sites. Government happens to hold considerable information and data which might be used in this way, from geospatial data to traffic flow information.

54 While elegant for its simplicity, the PFGHI does not deal in any detailed way with the sometimes complex issues of licensing, re-use or commercial exploitation of government-held and owned copyright material, and there was no such discussion in the Cabinet paper or Cabinet Committee minute preceding its release.[17] That is no criticism. The PFGHI was largely fit for purpose at the time and has largely stood the test of time. But it is no longer adequate, on its own, to deal with the issues of re-use of public sector information and data that arise in today's digital age. It also suffers from a lack of terminological precision. Most conspicuous is its statement that "information created by departments is subject to Crown copyright." That is an overstatement because not all information created by departments is subject to Crown copyright. Only qualifying works are subject to Crown copyright.

55 In addition, the Policy Framework only applies to departments. It does not apply to the wider State Services. As such, it does not apply to Crown entities, many of which hold large repositories of valuable material. It is considered desirable for guidance from the State Services Commission on the licensing of public sector copyright works to expressly contemplate relevant material held by the wider State Services.

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15 Web feeds are particular types of file, accessible via a URL, which, among other things, allow one to keep track of changes to website content, automatically, without visiting the websites themselves.

16 API is the acronym for Application Programming Interface, a set of routines, data structures, object classes and/or protocols provided by libraries and/or operating system services in order to support the building of applications; see further http://en.wikipedia.org/wiki/API

17 CGA (97) 12 (Cabinet paper) and CAB (97) M 15/4C (Cabinet Committee minute).

Web Standards

56 Commission officials have recognised that Web Standard 16.5 is in need of amendment, because:

(a) while the Web Standards are mandatory only for departments, Crown entities and SOES are asked to comply with them; it appears, as a result of this, that a significant number of Crown entities have sought to adhere to the letter of Web Standard 16.5, which is limited in terms to "Crown copyright", thereby producing erroneous copyright statements on their websites (they are erroneous because they refer to "Crown copyright" rather than "copyright");

(b) there is potential inconsistency in the Web Standard between what appear to be prescribed minimum mandatory requirements and the guidance which states that agencies can assert their own copyright and/or alter the terms of the copyright statement; and

(c) Web Standard 16.5's stated rationale is a supposed "government mandate to disclaim Crown copyright" when there is, in fact, no government mandate to "disclaim", or waive, Crown copyright.

57 It is important to recognise these shortcomings of Web Standard 16.5 in the context of this Discussion Paper, because:

(a) websites are the primary means by which government agencies make information (including copyright material) available to the public for consumption and re-use; and

(b) some of the criticisms and misapprehensions that exist regarding Crown copyright (discussed above) may flow from those shortcomings.

58 As an aside, the issues with Web Standard 16.5 have now been addressed. A revised Standard was released around mid March 2009.[18] The Guide to the new Standard notes that the State Services Commission "is currently undertaking an Open Government Information and Data Re-use Project which entails consideration of whether Creative Commons licences should be adopted for governmental use", adding that the "Standard is expected to be further amended once a decision on that issue has been made."[19]

Increasing agency interest in Creative Commons licences

59 Creative Commons licences are not yet in widespread use across government, but it is apparent that considerable interest is being shown in their potential use. For example:

(a) the State Services Commission has been approached by agencies interested in using them (both before and after introduction of the New Zealand law versions);

(b) a government ministry is considering using one of them to licence one of its databases; and

(c) they are already in use by certain public sector and quasi-public sector organisations, including:

(i) the University of Auckland's Department of Statistics;[20]

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18 http://webstandards.govt.nz/copyright/

19 http://webstandards.govt.nz/guide-to-the-copyright-standard/

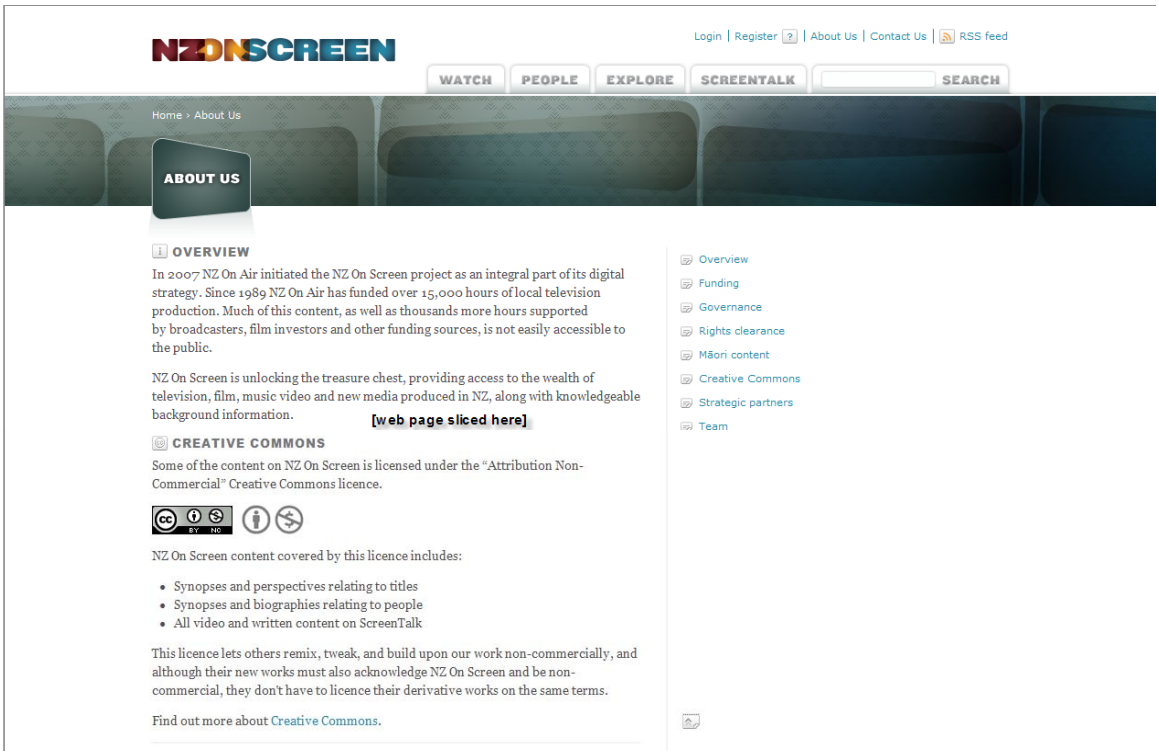
20 http://www.stat.auckland.ac.nz/~paul/ItDT/

(ii) SSC in the form of the Staff Contribution Guidelines for the In Development blog and the Research e-Labs site;[21]

(iii) Te Papa;[22]

(iv) Victoria University of Wellington; [23] and

(v) NZ On Air's NZ On Screen.[24]



Notable public sector information initiatives across the State Services

60 In addition to the interest being shown in Creative Commons licences, Commission officials have observed with interest as a number of State Services agencies have begun to:

(a) open up sometimes large repositories of digital information and data; or

(b) help others to share their information and data online.

61 For example:

(a) Statistics New Zealand is making large stores of data freely available with its "Making Information More Freely Available" initiative;[25]

(b) the National Library-led DigitalNZ is working with content creators (including government, the education sector, cultural institutions, community groups and

21 http://blog.e.govt.nz/index.php/2008/03/13/staff-contribution-guidelines-for-in-development-creative-commons-style/ and http://research.elabs.govt.nz/about/

22 http://collections.tepapa.govt.nz/exhibitions/RitaAngus/Downloads.aspx

23 http://www.utdc.vuw.ac.nz/research/emm/index.shtml

24 http://www.nzonscreen.com/static/about#about6

25 See http://www.stats.govt.nz/about-us/making-more-information-free/default.htm

more) to help them get their content online in a form that can be easily found and used by others;[26]

(c) the National Institute of Water and Atmospheric Research has made large stores of information and data available online, with many of them being available for no charge;[27]

(d) the Ministry of Health (through its Health and Disability Systems Strategy Directorate's Public Health Intelligence) has developed PHIOnline, a tool for the visualisation of health and related information;[28] and

(e) the New Zealand Transport Agency provides real-time traffic data free of charge for development by third parties.[29]

International developments

62 There is significant and increasing activity at the international level in relation to enabling public sector information to be accessed and re-used.

63 The Queensland Spatial Information Office ("QSIO") of the Queensland Treasury have undertaken considerable research on international trends. They observe that, although attention has been given to improving access to public sector information since the 1980s, efforts to facilitate access and re-use have strengthened in recent years. They note that, as well as advances in technology, an important contributing factor has been the body of economic research over the past decade or so which points to the advantages to be gained, and that this trend is in recognition of the potential social and economic value of public sector information and datasets, articulated by key authors in this area.[30]

64 The following paragraphs provide a brief overview of activity in the European Union, the United Kingdom (an EU Member State) and Australia. The United States is not covered because much information produced by the US Federal Government does not qualify for copyright protection and can be re-used by those in the United States without any copyright restriction.[31]

European Union

65 As the QSIO notes,[32] internationally, one of the most significant initiatives has been the European Union's Directive on the re-use of public sector information ("the EU Directive"), adopted by the European Parliament and Council in 2003.[33] The EU Directive aimed to:[34]

(a) facilitate the creation of European Community-wide services based on or integrating public sector information;

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26 See http://www.digitalnz.org/

27 See http://www.niwa.co.nz/services/free

28 See http://www.phionline.moh.govt.nz/

29 See http://www.transit.govt.nz/road/infoconnect.jsp

30 See "Government Information and Open Content Licensing: An Access and Use Strategy" (Government Information Licensing Framework Project Stage 2 Report, October 2006), para 6.2 at p. 9, available at: http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727B0013C7EE

31 See CENDI's "Frequently Asked Questions About Copyright: Issues Affecting the US Government", 8 October 2008, at http://cendi.gov/publications/04-8copyright.html#316

32 Above n 30, para 6.3 at p. 9.

33 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, Official Journal of the European Union, L 345/90, 31 December 2003, available at http://europa.eu.int/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf

34 http://ec.europa.eu/information_society/policy/psi/what_is_psi/index_en.htm

(b) enhance an effective cross-border re-use of the information for added-value information and service; and

(c) limit distortions of competition on the Community information market.

66 The Directive was the culmination of efforts that began in the late 1980s. With a lack of clear policies or uniform practices in relation to access to and re-use of public sector information, European content firms dealing in the aggregation of information resources into value-added information products were perceived to be at a competitive disadvantage in comparison to their US counterparts. The lack of harmonisation of policies and practices regarding public sector information resources among the European Union Member States was regarded as a barrier to the establishment of European information products based on information obtained from different countries.[35]

67 The Directive regulates how public sector bodies should make their information available for re-use, and deals with key issues such as transparency of what is available and under which conditions, fair competition and non-discrimination between potential re-users. It addresses material held by public sector bodies in the Member States, at national, regional and local levels. Public sector bodies include ministries, State agencies and municipalities, as well as organisations for the most part financed by or under the control of the public authorities, such as the national meteorological institutes.

68 In 2007, the European Commission commissioned a study to assess the re-use of public sector information in three specific sectors, namely, geographical information, meteorological information and legal and administrative information. The study was undertaken by Micus Management Consulting GmbH, which reported in December 2008. Among other things, Micus Management concluded that:[36]

> "In order to increase especially the commercial re-use of PSI, PSI holders should adapt their policies regarding data delivery to the needs of their markets; simple licensing conditions being a prerequisite for the promotion of PSI re-use, PSI holders should focus primarily on this aspect.
>
> In all three sectors, re-users are interested in obtaining more PSI. The demand for their data is there. Even in the geographical information sector, which has experienced an intensive phase of substitution by private geodata providers, public [geographical information] is of great interest to re-users. Therefore, it is worthwhile putting an increased effort into setting acceptable and user-friendly conditions for re-use."

United Kingdom

69 As noted above, the United Kingdom ("UK") is a European Member State. It has incorporated the Directive into its domestic law via the Re-use of Public Sector Information Regulations 2005[37] and is advanced in its awareness of and approach to dealing with the various issues around re-use of public sector information that arise in practice.

70 The UK has developed a set of "Click-Use" online licences for the re-use of Crown copyright information, other public sector information and Parliamentary copyright information. These licences are known as:

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35 Above n 30, para 6.3 at p. 9.

36 Micus Management Consulting GmbH "Assessment of the Re-use of Public Sector Information (PSI) in the Geographical information, Meteorological Information and Legal Information Sectors: Final Report" 2 December 2008, available at: http://ec.europa.eu/information_society/policy/psi/docs/pdfs/micus_report_december2008.pdf

37 Available at http://www.opsi.gov.uk/si/si2005/20051515

(a) the "PSI Licence", covering core Crown copyright information and public sector information;

(b) the "Valued Added Licence", covering value added Crown copyright information; and

(c) the "Parliamentary Licence", which covers Parliamentary copyright information.

71 There is no charge for the PSI Licence or the Parliamentary Licence. There may be a charge for the Value Added Licence depending on the type and amount of Crown copyright information being re-used.[38]

72 The UK's illuminating July 2008 "Report on the Re-use of Public Sector Information"[39] reveals the lengths to which the UK has gone in considering and promoting the re-use of public sector information. The Report's Foreword by the UK Minister for Information notes that information is the lifeblood of any democracy, that information is a vital asset in the digital age and that the "PSI agenda is pivotal to how the government interacts with the people it serves". Among other things, the Report explains:

(a) how the UK's Office of Public Sector Information ("OPSI") delivers the policy lead on the re-use of PSI across the UK; acts as a regulator to promote high standards of information trading across the public sector under the Information Fair Trader Scheme (IFTS) and investigates complaints under the Re-use of Public Sector Information Regulations; licenses, advises and manages the re-use of Crown and Parliamentary copyright material through the click-use licences; and develops innovative technological solutions and models that support emerging information policy;

(b) that in 2004 OPSI introduced the Licensing Forum to bring together licensing practitioners across government;

(c) that the UK actively monitors its compliance with the EU Directive and has set up an online tool (IFTS Online) to assist agencies in gauging their own compliance;

(d) that OPSI is supporting an initiative led by the European publishing industry to create an open standard (the Automated Content Access Protocol (ACAP)) which will enable identification of material that contains third party rights on a web page in a format that machines as well as people can understand, OPSI's interest stemming from the need to identify third party rights on government websites so as to distinguish between information which can be licensed and that which cannot;

(e) that the UK has set up statutory complaints and mediation processes to deal with PSI-related issues and complaints;

(f) how the UK government encourages public-private partnerships to further the commercial exploitation of information assets, while taking care to ensure that such commercialisation does not cut across the thrust of the PSI agenda;

(g) that, "given the importance of aggregating and linking data across a wide spectrum of information sources, government is moving towards treating the web as a place to provide public services … and as a platform for data on which others can build services";

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38 http://www.opsi.gov.uk/click-use/index

39 http://www.opsi.gov.uk/advice/psi-regulations/uk-report-reuse-psi-2008.pdf

(h) that the Government commissioned an independent review into the use and communication of citizen- and State-generated public information in the UK[40] and then responded very positively to the reviewers' recommendations, accepting almost all of them and stating that:

(i) the Government should ensure it fully understands and responds appropriately to changes in the information market;

(ii) needless duplication of pre-existing user-generated websites is unsatisfactory and the Government should neither smother nor crowd out innovators;

(iii) the dynamics of information markets have changed radically due to advances in technology, that an important part of this change is the ability of individual innovators and social entrepreneurs to create information goods and services that were once the preserve of large corporations, and that the Government wishes to find a way of unlocking innovative potential for public information without jeopardising the production of public information itself and in a cost-efficient manner;

(iv) the Government would, as recommended, complete the then partially undertaken scoping and costing of a 'data mashing laboratory'; and

(v) subject to funding, the Government would create a web-based channel to gather and access requests for publication of public sector information and in more re-usable formats, something that is now a reality with the innovative Public Sector Information Unlocking Service which was released in July 2008;[41]

(i) that the UK Government has been exploring the use of semantic mark-up to facilitate access, use and re-use of data;

(j) that the click-use licences have proved to be extremely successful, with currently 15,000 licences in place;

(k) that OPSI is developing Click-Use as a SOAP web service,[42] with a view to automating the issue of licences machine to machine through the UK Government Gateway and providing a route for automating the issue of co-licences where the copyright is held by more than one party;

(l) that considerable work has been undertaken regarding the costs of creating information, pricing and licensing models, and UK government initiatives focusing on charging mechanisms;[43]

(m) that considerable thought is being given to information management standards and data quality; among other things, the UK Government recognises:

(i) the important role that Information Asset Registers ("IARs") can play,[44] noting that it is important for public sector bodies to create and populate

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40 E Mayo and T Steinberg *The Power of Information: An independent review by Ed Mayo and Tom Steinberg* (June 2007), available at http://www.opsi.gov.uk/advice/poi/power-of-information-review.pdf

41 http://www.opsi.gov.uk/unlocking-service/

42 SOAP is a protocol for exchanging XML-based messages over networks.

43 For example, the UK Office of Fair Trading's report on *Commercial Use of Public Information* (December 2006), available at http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/completed/public-information and the HM Treasury-commissioned report *Models of Public Sector Information Provision via Trading Funds* (February 2008), available at http://www.opsi.gov.uk/advice/poi/models-psi-via-trading-funds.pdf

IARs, but it is better that they publish their data on the web, and better again if that information is published in re-usable forms and under enabling licensing conditions; and

(ii) both the importance of and problems regarding web continuity, that is, the importance that web links remain consistent and resolve properly as against the reality that broken links on government websites are a problem;

(n) in the age of the citizen publisher and blogger, what may seem to be a complex mixture of waivers and licensing processes for re-use adds to complexity, with simplification being desirable.

Organisation for Economic and Co-operation Development ("OECD")

73 New Zealand is an OECD member country.

74 On 17-18 June 2008, an OECD Ministerial Meeting took place in Seoul, Korea, on the future of the internet economy. The Meeting brought together Ministers, senior government officials, the heads of major intergovernmental organisations, industry leaders and representatives of the Internet technical community, civil society and organised labour. In all, close to 2,300 participants from 70 economies attended the Meeting.[45]

75 The *Seoul Declaration for the Future of the Internet Economy* was adopted by 39 countries (including New Zealand) and the European Community. It outlines the basic principles that will guide further development of the Internet Economy.[46] In addition, Ministers welcomed and recognised the importance of the OECD report on *Shaping Policies for the Future of the Internet Economy*,[47] recommending that governments consider it in developing their policies. The report includes new policy guidance in eight areas; in two of the areas, formal Council Recommendations were adopted.[48] One of the items of policy guidance was the *OECD Policy Guidance for Digital Content*[49] and one of the Council Recommendations was the *OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*.[50]

76 The *OECD Policy Guidance for Digital Content* sets out a number of digital content principles which aim to "help promote an enabling environment, enhance the infrastructure, and foster a business and regulatory climate conducive to the creation, access to and preservation of digital content." One of those principles is, specifically, "promoting an enabling environment", two aspects of which are:

(a) policies that encourage a creative environment that stimulates market and non-market digital content creation, dissemination, and preservation of all kinds; and

(b) policies that enhance access and more effective use of public sector information.

77 The *OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information* recommends that, in establishing or reviewing their

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44 The Report notes, at para 7.12, that the role of IARs is to present metadata about the information assets which may sit under the surface information within public sector information holders' websites and may be difficult to find.

45 OECD Ministerial Meeting, Seoul, Korea, 17-18 June 2008, *Summary of the Chair*, available at http://www.oecd.org/dataoecd/53/49/40989438.pdf

46 http://www.oecd.org/dataoecd/49/28/40839436.pdf

47 http://www.oecd.org/dataoecd/1/29/40821707.pdf

48 Above n 45.

49 http://www.oecd.org/dataoecd/20/54/40895797.pdf

50 http://www.oecd.org/dataoecd/0/27/40826024.pdf

policies regarding access and use of public sector information, Member countries take due account of and implement the following principles, which provide a general framework for the wider and more effective use of public sector information and content and the generation of new uses from it:[51]

(a) **Openness**: ensuring there is openness in access and re-use of information practices and clarity on refusal of information, restrictions to information, or licensing regimes.

(b) **Access and transparent conditions for re-use**: encouraging non-discriminatory practices and eliminating exclusive arrangements and restrictions, ensuring improved access to PSI.

(c) **Asset lists**: promoting awareness of PSI in the form of information asset lists and other inventories.

(d) **Quality**: maintaining and enhancing quality and reliability of information through co-operation of stakeholders and partners, and through best practice.

(e) **Integrity**: maintaining and improving integrity and availability through best practice.

(f) **New technologies and long term preservation**: through the use of new technologies ensuring information is preserved; access and reuse mechanisms are developed and enhanced; and there is opportunity to develop new innovative products and services.

(g) **Copyright**: facilitating re-use of PSI whilst ensuring copyright ownership is respected.

(h) **Charging**: ensuring transparent and consistent pricing regimes where information is not provided free of charge.

(i) **Competition**: ensuring there is competition to promote fairness and equality for customers.

(j) **Redress mechanisms**: providing transparent complaints and appeals procedures.

(k) **International access and use**: ensuring consistency in access and re-use practices across cross-border organisations and increasing co-operation.

(l) **Best practice**: sharing knowledge and best practice.

Australia

78 With initiatives afoot in Queensland, Victoria and at the federal level, Australia is ahead of New Zealand when it comes to considering open source licensing of public sector information.

Queensland

79 In 2006, the Queensland Spatial Information Council ("QSIC") commissioned the Government Information Licensing Framework Project ("GILF Project"), to review the business environment in terms of best practice and international trends in the transaction of public sector information. The GILF project is concerned with creating and implementing a new standardised information licensing arrangement for all Queensland government information, not just spatial information, so as to provide enhanced, on

[51] As helpfully summarised in the UK Government's July 2008 *Report on the Re-use of Public Sector Information*, above n 36, p. 47.

demand access to accurate, consistent and authoritative information and support a range of the government's initiatives dependent on strategic information.[52]

80 The GILF Project's research into national and international open content licensing initiatives identified non-standard and conflicting approaches to licensing:[53]

(a) the majority of Queensland government business units did not use any formal licensing;

(b) those that did varied in their legal frameworks significantly;

(c) then current "standard" approaches were dated with many derivatives;

(d) there was a non-standard approach of access for data users;

(e) it was potentially more difficult for government agencies to deal with each other than to get the same information from outside Government;

(f) inter-jurisdictional exchange was problematic;

(g) there was complexity for people dealing with multiple departmental approaches to information licensing;

(h) agencies considered themselves as unique business entities, not as a single government; and

(i) licences did not reflect the mature business approach that agencies wished to take to data use and re-use.

81 As an aside, and whilst acknowledging that this research surveyed Queensland state government agencies, some of the findings are consistent with those in this Discussion Paper for New Zealand government agencies and it appears likely that, overall, New Zealand government results would be similar.

82 Having reviewed national and international open content licensing initiatives on the use and reuse of public sector information, the GILF Project's Stage 2 Report,[54] released in March 2007, concluded that the Creative Commons licences were the most appropriate available for the licensing of government material … [and] that, while a qualifying process for material to be included in the licensing program would be needed to ensure that privacy, confidentiality, security and other legal issues were considered, approximately 85 percent of government material could and indeed should be made available under a Creative Commons licence".[55]

83 The GILF Project has confirmed the legal validity of the Creative Commons licences and has developed a GILF Toolkit to assist custodians in implementing open content licensing, including the use of Creative Commons licences.[56] That Toolkit is being tested in pilot projects in Queensland.

84 The GILF Project reported by way of presentation in November 2008[57] that:

(a) there is overwhelming demand for clear and simple licensing;

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52 http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/6C31063F945CD93B4A257096000CBA1A

53 QSIC "Government Information Licensing Framework" presentation, http://tinyurl.com/d5472p

54 Queensland Spatial Information Office, Office of Economic and Statistical Research, Queensland Treasury "Government Information and Open Content Licensing: An Access and Use Strategy – Government Information Licensing Framework Project Stage 2 Report (October 2006), available at http://tinyurl.com/bzntg

55 A Fitzgerald, B Fitzgerald and J Coates "Serving the Public: CC and Australian Governments" 23 July 2007, available on the iCommons website at http://www.icommons.org/articles/serving-the-public-cc-and-australian-governments

56 Above n 54, p. 25.

57 Above n 53.

(b) there is overwhelming support from stakeholders in all levels of Government for a standard licensing framework;

(c) Creative Commons licences would support the vast majority (85%) of data access and use transactions for Government agencies;

(d) there is a need for more detailed analysis of the remaining "15%" – negotiated transactions with privacy, security, confidentiality, legislative and/or policy constraints or high end commercial transactions; and/or

(e) there will be a need for comprehensive and prescriptive Information Management principles for use in the Queensland Government.

85 The GILF Project's Toolkit has now been successfully trialled in the Office of Economic and Statistical Research in the Queensland Treasury.[58] That trial is part of a wider project being conducted under a Cooperative Research Centre program which involves collaboration with the Queensland University of Technology, Australian Bureau of Statistics, Western Australian Department of Landgate and Queensland Department of Natural Resources and Water.

86 The GILF Project is also developing one or more licences to apply to restricted information and a digital information licensing management software specification, carrying out a cost benefit analysis, and preparing a business case for securing implementation funding.

Victoria

87 On 27 February 2008, the Economic Development and Infrastructure Committee of the Parliament of Victoria received, from the Legislative Assembly, Terms of Reference for an Inquiry into Improving Access to Victorian Public Sector Information and Data. The Terms of Reference required the Committee to examine a range of issues surrounding the application of open content and open source licensing to improve access to Victorian government information and data.

88 In July 2008 the Committee released a Discussion Paper on the topic and sought submissions.[59] The paper contains a balanced discussion of, among other things, the pros and cons of increasing access to public sector information, the different pricing models that might be applied to it (including marginal or no cost), and the different open content licensing frameworks that might be selected. The Paper is illuminating for drawing one's attention to both sides of the debate on such issues.

89 Key points considered important to note in this Discussion Paper are as follows:

(a) in discussing economic and social issues surrounding access to public sector information, the Paper notes that "[e]merging evidence suggests that in some cases improved access to and re-use of PSI can increase net returns on investment by government, particularly when access to publicly funded research is improved, and that this is viewed as particularly beneficial to information markets that typically operate on high-fixed costs;

(b) in addressing issues of pricing for PSI access the Paper notes that the literature regarding access to PSI typically makes reference to two broad access models: the

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58 See "GILF Seminar Series for Queensland Government Legal Services Directors and Managers" at http://datasmart.oesr.qld.gov.au/Events/datasmart.nsf/3fec4e05081274b74a256e620014dd91/6170206ea2c970814a257512001f1d6e?OpenDocument

59 EDIC "Inquiry into Improving Access to Victorian Public Sector Information and Data – Discussion Paper July 2008", available at http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/EDIC_PSI_Discussion_Paper.pdf

first is commercialisation, which comprises either cost-recovery strategies that aim to recoup some or all of the costs of data production or profit maximising strategies where prices are set above the costs of data production; the second model is open access where PSI is priced at either no or marginal costs, with the latter applying principally when data is not disseminated electronically. The paper notes that these two models represent divergent philosophical rationales that place different emphases on the balance between the rights of citizens to access PSI and the economic return to government that can be achieved through the commercialisation of PSI;

(c) in discussing access at no or marginal cost versus commercialisation, the Paper opines that the "emerging consensus regarding access to PSI is that access at no or marginal cost is the best approach to ensure the greatest re-use of PSI within the public domain", noting, however, that opponents to this model question the sustainability of government providing PSI at no or marginal prices when the cost of creating the information can be substantial for governments;

(d) in addressing open content licensing, the Paper observed that "there is a growing consensus among those who support open access to PSI that existing licensing systems used by government require remodelling to improve accessibility", noting further that a 2005 review of Crown copyright determined the need to promote the widest possible access to government-owned materials and recommended the abolition of the Crown copyright provisions (a recommendation which has not been taken up);

(e) the Paper refers to a number of open content licensing models that have been developed in recent years (AEShareNet Limited, the UK Click-Use licenses, Creative Archive, and BC Commons), and then notes that the most commonly recognised model is Creative Commons;

(f) the Paper contains substantial discussion of the Creative Commons model, noting the arguments of Creative Commons advocates that:

  (i) one of the main advantages for government is that the system is ready to use and is compatible with domestic copyright legislation;

  (ii) the potential for the adoption of the Creative Commons licensing system to lead to the establishment of a consistent, whole-of-government copyright policy;

  (iii) the accompanying technical infrastructure that ensures re-usable works are easily discoverable;

  (iv) the simplistic nature of the licensing system, which allows users to easily interpret the icons and human-readable code;

(g) the Paper also discusses the arguments or speculation of Creative Commons opponents, that:

  (i) the simplistic nature of Creative Commons may be problematic for government in that, because the number of Creative Commons licences must be kept to a minimum and must not steer too far from the core licence, there is little opportunity to draft additional licence conditions that are specifically relevant to government;

(ii) some of the wording in the Australian versions of the Creative Commons licences may be misleading on issues of adaptations/derivative works and commercial versus non-commercial use;

(iii) the Creative Commons licences lack geographical restrictions, prompting some to question whether it is appropriate for resources that are created using public funds from one jurisdiction to be made available for world-wide use (which prompted creation of the UK Creative Archive Licence Group and its Creative Archive licence with territorial restriction);

(iv) the Australian Creative Commons licences do not contain "no endorsement" and "no derogatory use" conditions;

(v) Creative Commons licences are not appropriate for all public sector information, meaning that other license templates will be required, possibly leading to a suite of inconsistent licences and suggesting that the government might develop its own suite of licences tailored to the specific purposes of government and to be adopted as an overarching policy;

(h) as regards the implementation of a preferred licensing model, there is an emerging consensus that emphasises the need for government to develop a clear policy framework and guiding principles to assist the implementation process; this is considered to be particularly important when implementing an open content licensing system so there is clarity about the type of information that will be made available, how it will be made available, if it is appropriate for licensing and on what terms; and

(i) the literature identifies the following matters for attention when implementing an open content licensing model:

(i) identifying material for open access;

(ii) identifying and managing third party intellectual property;

(iii) systematic digitisation of analogue materials;

(iv) development of electronic catalogues and open access repositories of digital content;

(v) ensuring or encouraging inclusion of material in open access repositories; and

(vi) creating systems for prospective users to identify the available material.

Federal Government[60]

90 At the federal level, the Cross Jurisdictional Chief Information Officers Committee ("CJCIOC") reporting to the Ministerial Online and Communications Council ("OCC") has identified licensing as an issue requiring a national solution. In May 2008 the CJCIOC approved a Work Plan for a Government Information Licensing Framework for the Nation Project ("NGILF"), based on the Queensland GILF Project. The CJCIOC has recognised that, to be an effective national solution for information licensing, it would be important to allow all Australian jurisdictions time to review the work completed to date by the Queensland Government and to validate the proposed model in each jurisdiction.

[60] See "Government Information Licensing Framework for the Nation" at http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/9389F8EA89B0E25F4A25750F0012AF94

91 The Work Plan for the NGILF includes:

(a) the development of an online e-learning toolkit from March 2009 that:

(i) provides a site for the Framework that is widely accessible;

(ii) educates information creators, publishers and users about licensing of public sector or government information; and

(iii) provides a decision support tool to assist information creators and publishers to apply appropriate licences to copyright works and materials or information products;

(b) identification of an Information Licensing champion in each jurisdiction.

92 Consistently with the Queensland GILF Project, the NGILF licences are expected to comprise a set of seven licences and cover 95% of public sector information transactions: the 6 Creative Commons Australia licences, which can be applied to the majority of copyright government information, plus one legal agreement for licensing the release of data when specific use restrictions apply.

93 As is sometimes the case, both here and abroad, some individual federal agencies in Australia have taken the initiative and decided to use Creative Commons licences for specific purposes before the release of a national framework.

94 For example, the Australian Bureau of Statistics ("ABS", a federal government agency) announced in late December 2008 that it had introduced Creative Commons licensing for the bulk of the content on its website, noting that this would lessen the restrictions on the use of free data from the website considerably by changing the copyright from "all rights reserved" to "some rights reserved". It said:[61]

> "In effect, what the ABS is asking is only that it be acknowledged as the source of the data. People are free to re-use, build upon and distribute our data, even commercially. This makes a wealth of data readily available to the community, researchers and business, facilitating innovative research and development projects based on quality statistics, and promoting the wider use of statistics in the community, which is one of our core objectives."

95 Similar initiatives are afoot in other Australian commonwealth agencies.[62]

96 At around the same time as the ABS announcement, the Australian Government's Department of Broadband, Communications and the Digital Economy released a "Digital Economy Future Directions Consultation Paper".[63] Among other things, that paper touches on issues of open access to public sector information, stating that:

(a) "the internet and Web 2.0 technologies are increasing the potential for economic and socially-valuable use and reuse of information created by governments, and [that] there is a growing volume of support for the notion that the Australian Government should provide access to public sector information … on terms that clearly permit the use and re-use of that information";

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61 "Creative Commons licensing is coming to the ABS!", http://tinyurl.com/dxjlcn

62 See, e.g., Geoscience Australia's presentation "Creative Commons at Geoscience Australia", available at http://www.oaklaw.qut.edu.au/files/Kingwell.PPT and the copyright statement for the Australian Mines Atlas at http://www.australianminesatlas.gov.au/build/common/copyright.jsp; in the case of the Bureau of Meteorology, see "Economic Development and Infrastructure Committee: Inquiry into Improving Access to Victorian Public Sector Information and Data" (8 September 2008), p. 3, at: http://www.parliament.vic.gov.au/edic/inquiries/access_to_PSI/transcripts/EDIC_080908_BOM.pdf

63 See http://www.dbcde.gov.au/communications_for_business/industry_development/digital_economy at pp. 3-5.

(b) the "Australian Government recognises that open access to certain categories of PSI can achieve economic benefits and social well-being", noting in this context, among other things, that:

(i) new and emerging mapping tools and applications allow data to be combined on a map in innovative ways that can lead to the development of better consumer experiences and also better public service delivery and policy development;

(ii) geo-location data can also improve government and community groups' ability to serve the public interest; and

(iii) spatial information is increasingly used in many sectors of the economy and is having a direct and positive impact on productivity; the Paper refers to industry reports that "provide examples of economic modelling that identify and estimate that the use of spatial data and high precision positioning systems can increase productivity across a range of sectors such as, agriculture (grains and cattle), forestry, fisheries, property and business services, construction, transport, electricity, gas and water, mining and resources, resource exploration, communications and government".

The current economic climate

97 As noted above, the Internet and web technologies have fundamentally transformed the way in which people discover and use information. So-called "web 2.0" technologies and applications bring people and content together and allow the re-purposing of information and data in ways that were not possible a mere 5 to 10 years ago.

98 Government has an opportunity to make its non-personal and otherwise non-sensitive information (including but not limited to copyright material) more freely available using these technologies. Where appropriate, it can release information and data quickly and efficiently and allow it to be used in novel ways, for the benefit of individuals, businesses and the wider economy.

99 If ever there were an optimal time to do so, arguably it is now. In a recession, individuals and businesses need to find new ways to both help each other and boost the economy. Government can play a powerful part by, among other things, releasing for re-use and positive exploitation some of the vast stores of often tax-payer funded material it holds.

All-of-government Adoption of Open Content Licences for Public Sector Copyright Works

Terminology and different licensing models

100 In the literature on access to and re-use of public sector information and data, one commonly sees references to "open content" licensing, "open access" and "open information models" of licensing. At their core, these terms all refer to the same thing, namely, releasing public sector copyright information and data on liberal terms and in formats that permit and readily enable public use and reuse of that information and data.[64] Copyright in the information and data is retained, but is licensed in broad terms allowing re-use. (While one commonly sees references to "information" and "data", it is important not to lose sight of the fact that not all public sector information and data is copyright material; rather, as noted at paragraph 22 above, to be protected, the material in question must be an original work falling within one or more of the categories set out in the Copyright Act 1994.)

101 Open access or open content models differ from more traditional content licensing models, the starting position of which is that one cannot use the copyright material without the permission of the copyright owner, with any licensing that does occur being to specific people or organisations and for limited purposes. These traditional models do not encourage wide uptake and re-use of public sector copyright material. As Queensland University of Technology's Professor Brian Fitzgerald puts it, the default rules can lead to gridlock.[65]

102 The QSIO notes that the "open content licensing model is of particular relevance in systems designed to facilitate access to and re-use of public sector materials because, as well as acknowledging government ownership of copyright, it sets the conditions on which public sector information may be accessed and re-used in the digital, online context".[66] The Commission agrees.

Good reason to advocate open content models in New Zealand

103 Having considered the six drivers above behind the Commission undertaking the Open Government Information and Data Re-Use Project, the Commission considers that there is solid collective reason for the Government to advocate all-of-government adoption of a suite of open content licences for public sector copyright material where it is appropriate for such material to be made available for re-use.

104 The Commission's preliminary view is that the suite of Creative Commons New Zealand law licences represents the most obvious candidate for potential governmental adoption, possibly in conjunction with one or more additional restrictive licences and/or indigenous licences.

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64 This explanation paraphrases and slightly expands upon the succinct description of "open access" in the Australian Government's Department of Broadband, Communications and the Digital Economy's "Digital Economy Future Directions Consultation Paper", above n 63.

65 B Fitzgerald "Web 2.0 Landscape – Access and Reuse as a Driver of Innovation: 'Efficiency, Quality and Impact'", presentation available online at: http://www.qsic.qld.gov.au/qsic/QSIC.nsf/0/D2A10C510687D37D4A2575120018FF96/$FILE/CJIOC%20Brian%20Fitzgerald.pdf?openelement

66 Above n 54, p. 30.

Analysis of All-of-government Use of Creative Commons New Zealand Law Licences

105 To explain the Commission's preliminary view that the suite of Creative Commons New Zealand law licences represent the most obvious candidate for potential governmental adoption, this section of the Discussion Paper:

(a) explains the Creative Commons movement and the Creative Commons New Zealand law licences; and

(b) assesses whether the use by government agencies of those licences:

(i) is legally acceptable, from licence coverage and risk management perspectives, in the light of the terms and conditions in the Creative Commons licences; and

(ii) could alleviate the confusion and criticisms referred to above regarding Crown copyright and current licensing regimes and foster a consistent approach to the licensing of material that is subject to Crown or other copyright.

Creative Commons and Creative Commons Aotearoa New Zealand

The genesis and aim of Creative Commons

106 Creative Commons was founded in 2001 by Professor Lawrence Lessig, Professor of Law at Standford Law School and proponent of reduced legal restrictions on, among other things, copyright.

107 As noted on the Creative Commons Aotearoa New Zealand website,[67] Creative Commons aims to establish a fair middle way between what it refers to as "the extremes of copyright control"[68] and the uncontrolled uses of intellectual property. It provides a range of copyright licences, freely available to the public, which allow those creating intellectual property – including authors, artists, educators and scientists – to mark their work with the freedoms they want it to carry.

108 The role of Creative Commons licences in the copyright-to-public-domain continuum is usefully summarised on the Creative Commons website as follows:[69]

67 http://www.creativecommons.org.nz/

68 A phrase with which some take issue: see article on Copyright Council of New Zealand's website, "Creative Commons – the fine print", 16 April 2008, available at http://www.copyright.org.nz/viewArticle.php?article=479

69 http://creativecommons.org/about/

International standardisation

109 The original set of Creative Commons licences have been "ported" to the laws of multiple jurisdictions around the world.[70] They are now available for the following jurisdictions: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China Mainland, Colombia, Croatia, Denmark, Ecuador, Finland, France, Germany, Greece, Guatemala, Hong Kong, Hungary, India, Israel, Italy, Japan, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Netherlands, **New Zealand**, Norway, Peru, Philippines, Poland, Portugal, Puerto Rico, Romania, Serbia, Singapore, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, UK: England and Wales, UK: Scotland, and the United States.

The Creative Commons New Zealand law licences

110 The New Zealand law Creative Commons licences were released towards the end of 2007 by Creative Commons Aotearoa New Zealand, the New Zealand collaborator of Creative Commons International. Te Whāinga Aronui/the Council for the Humanities is leading the development of Creative Commons in New Zealand with, to date, generous pro-bono legal support principally from private sector and academic lawyers. The Commission acknowledges and is grateful for the work of Creative Commons Aotearoa New Zealand, Te Whāinga Aronui/the Council for the Humanities and those lawyers.

111 There are six Creative Commons New Zealand law licences:[71]

(a) Attribution 3.0 New Zealand (BY);

(b) Attribution-Noncommercial 3.0 New Zealand (BY-NC);

(c) Attribution-Noncommercial-No Derivative Works 3.0 New Zealand (BY-NC-ND);

(d) Attribution-Noncommercial-Share Alike 3.0 New Zealand (BY-NC-SA);

(e) Attribution-No Derivative Works 3.0 New Zealand (BY-ND); and

(f) Attribution-Share Alike 3.0 New Zealand (BY-SA).

112 As noted on the Creative Commons Aotearoa New Zealand website,[72] the licences share a set of baseline rights, with each licence choice being expressed in three ways:

(a) **Commons Deed**: A plain-language summary of the licence, with relevant icons.

(b) **Legal Code**: The full legal terms.

(c) **Digital Code**: A machine-readable translation of the licence that helps search engines and other applications identify the licensed work by its terms of use.

113 The existence of these three forms of expression is significant:

(a) the Commons Deed form makes the licences readily comprehendible to the general public;

(b) the Legal Code is, of course, required to ensure the licences are legally sound; and

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70 The reference here to "porting" means ensuring the licences are compatible with a jurisdiction's domestic law and making them subject to that law.

71 The Commission notes that a non-jurisdictional Creative Commons licence exists, the Creative Commons Zero/CC0 licence, which enables "owners of copyright-protected content to waive copyright interests in their works and thereby place them as completely as possible in the public domain, so that others may freely build upon, enhance and reuse the works for any purposes without restriction under copyright" (see http://creativecommons.org/about/cc0). That form of licence is not addressed in this Discussion Paper.

72 http://www.creativecommons.org.nz/choose_and_apply_a_cc_licence

(c) the Digital Code[73] facilitates the distribution and discoverability of the licensed works; this is likely to become increasingly significant in the digital age and one can imagine a government index or register of Creative Commons-licensed works being built which leverages off this metadata (assuming the government were to advocate all-of-government use of Creative Commons licences).

114 The tables that follow summarise the terms of each of the licences. A summary table is followed by a table setting out the précis for each licence found on the Creative Commons Aotearoa New Zealand website as well as a more detailed listing of the key aspects of each licence.

115 A key point to emphasise at the outset is that, in all cases, Crown copyright or other copyright in the subject material is preserved. The effect of the licences is to allow certain forms of copying, adaptation and distribution.

BY		Attribution
BY-NC		Attribution – Noncommercial
BY-NC-ND		Attribution – Noncommercial – No Derivatives
BY-NC-SA		Attribution – Noncommercial – Share Alike
BY-ND		Attribution – No Derivatives
BY-SA		Attribution – Share Alike

[73] The Digital Code can be found here: http://creativecommons.org/license/?jurisdiction=nz

Table: Summary of Creative Commons New Zealand Licences

Licence type	Summary of licence[74]	Key legal aspects of licence[75]
Attribution 3.0 New Zealand (BY) 	This licence lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of the licences offered, in terms of what others can do with your works licensed under Attribution.	Key legal aspects: • Worldwide, royalty-free, non-exclusive, Licence for use for duration of copyright in the Work • Licensee may copy Work, create Adaptations, incorporate Work into Collections, copy Adaptations or Work as incorporated in Collections, and publish, distribute, archive, perform or otherwise disseminate the Work, Adaptation or Work as incorporated in any Collection, to the public • Licensee must not impose either terms restricting scope of licence or digital rights management technology on the Work • Licensee must not sublicense the Work • Licensee must not subject Work to derogatory treatment as defined in Copyright Act (although Licensor waives its moral right to object to derogatory treatment to the extent necessary to enable licensee to reasonably exercise its right under the Licence to make Adaptations) • Licensee must reference Licence on all copies of the Work/Adaptations/Collections published, distributed, performed or otherwise disseminated to the public • Licensee must recognise Licensor's/Original Author's right of Attribution (right to be identified) • Licensee must not assert/imply sponsorship or endorsement by Original Author or Licensor without express prior written permission • Licensee must, to extent reasonably practicable, keep intact all notices that refer to the Licence • Licensor waives the right to collect royalties for any exercise by licensee of rights

[74] These summaries are taken from the Creative Commons Aotearoa New Zealand website, at: http://www.creativecommons.org.nz/choose_and_apply_a_cc_licence

[75] Capitalised terms are defined within the licence.

		granted under the Licence • Except as required by law or agreed in writing between parties, Work is licensed by Licensor on "as is" and "as available" basis without any warranty of any kind, express or implied • Except as not permitted by law, Licensor excludes all liability for loss or damage • Licence terminates automatically upon breach by licensee of terms of Licence
Attribution-Noncommercial 3.0 New Zealand (BY-NC) 	This licence lets others remix, tweak, and build upon your work noncommercially and although their new works must also acknowledge you and be noncommercial, they do not have to license their derivative works on the same terms.	Same key legal aspects as **Attribution 3.0 New Zealand (BY)** licence (immediately above) except that: • Licence limited to "Non-Commercial use". "Non-Commercial" means "not primarily intended or directed towards commercial advantage or private monetary compensation" • Licence preserves right to collect royalties for any use of the Work which results in commercial advantage or private monetary compensation (but Licensor still waives right to collect royalties for any use of the Work which does not result in commercial advantage or private monetary compensation)
Attribution-Noncommercial-No Derivative Works 3.0 New Zealand (BY-NC-ND) 	This licence is the most restrictive of the six main licences, allowing redistribution. This licence is often called the "free advertising" licence because it allows others to download your works and share them with others as long as they mention you and link back to you, but they cannot change them in any way or use them commercially.	Same key legal aspects as **Attribution-Noncommercial 3.0 New Zealand (BY-NC)** licence (immediately above) except that: • The right to create Adaptations and all other rights in relation to Adaptations have been removed and there is an express prohibition on the making of any Adaptations • There are consequential amendments reflecting the reduced scope of the Licence

Attribution-Noncommercial-Share Alike 3.0 New Zealand (BY-NC-SA) 	This licence lets others remix, tweak, and build upon your work noncommercially, as long as they credit you and license their new creations under the identical terms. Others can download and redistribute your work as they can with the BY-NC-ND licence, but they can also translate, make remixes, and produce new stories based on your work. All new work based on yours will carry the same licence; so any derivatives will also be noncommercial in nature.	Same key legal aspects as **Attribution-Noncommercial 3.0 New Zealand (BY-NC)** except that: • There are new provisions (including a new definition of "Licence Elements") requiring the licensee to make any Adaptation or Adaptation as incorporated in a Collection available to third party users on either the same terms and conditions of this Licence or a later version of it or any other Creative Commons licence (whether the Unported or a jurisdiction licence) with the same Licence Elements
Attribution-No Derivative Works 3.0 New Zealand (BY-ND) 	This licence allows for redistribution, commercial and noncommercial use of your work, as long as it is passed along unchanged and whole, with credit to you.	Same key legal aspects as **Attribution 3.0 New Zealand (BY)** licence except that: • The right to create Adaptations and all other rights in relation to Adaptations have been removed and there is an express prohibition on the making of any Adaptations • There are consequential amendments reflecting the reduced scope of the Licence
Attribution-Share Alike 3.0 New Zealand (BY-SA) 	This licence lets others remix, tweak, and build upon your work even for commercial purposes, as long as they credit you and license their new creations under the identical terms. This licence is often compared to open source software licences. All new works based on yours will carry the same licence; so any derivatives will also allow commercial use.	Same key legal aspects as **Attribution 3.0 New Zealand (BY)** licence except that: • There are additional provisions (including a new definition of "Licence Elements" (similar to that in the Attribution-Noncommercial-Share Alike 3.0 licence) and "Creative Commons Compatible Licence" (not found in any other New Zealand Creative Commons licence)) requiring the licensee to make any Adaptation or Adaptation as incorporated in a Collection available to third party users on either the same terms and conditions of this Licence or a later version of it or any other Creative Commons licence (whether the Unported or a jurisdiction licence) with the same Licence Elements or a Creative Commons Compatible Licence

Legal and commercial analysis of the Creative Commons New Zealand law licences

116 The Creative Commons New Zealand law licences have been legally reviewed and are considered to be legally sound and appropriate for governmental use. This view is consistent with that reached in Australia as part of Queensland's GILF Project. There are some potential drafting issues (discussed further below), but they are not considered to be of such significance as to preclude governmental adoption and can be expected to be rectified when the Creative Commons New Zealand law licences undergo their next review.

117 In coming to this conclusion, both the individual terms of the licences and the following specific issues were considered:

(a) whether the licence choices cater for a sufficiently diverse range of circumstances in which government agencies may wish to licence copyright material on varying "open access" terms, including where agencies may wish to recover a statutory charge or other licence fee for licensed provision of the material;

(b) whether the licences provide the Crown or other public sector bodies with sufficient protection from liability;

(c) whether use of Creative Commons licences would give rise to an implied indemnity under Part 8 of the Copyright Act or to any other issues under or related to that Part, including whether governmental adoption of Creative Commons or other standard licences would conflict with the current practices of copyright licensing schemes in New Zealand;

(d) whether the licences are sufficiently clear and self-explanatory in their terms to encourage uptake and, if not, whether any particular legal issues ought to be explained in accompanying guidance;

(e) whether any of the licences might be considered inconsistent with any legislation.

118 Each of these particular issues is discussed below.

Do the licence choices cater for a sufficiently diverse range of circumstances, including the recovery of statutory charges or other licence fees?

Range of circumstances covered

119 As will be evident from the table above, the six licences do cater for a wide range of circumstances in which agencies may wish to licence their copyright material. At their core, all of the licences:

(a) allow copying and certain forms of distribution; and

(b) require attribution to the original author/agency.

120 The Attribution (BY) licence is the most permissive form of licence, allowing others to distribute, remix, tweak, and build upon the original work, including for commercial purposes, as long as they credit the original author/agency for the original creation.

121 The variants then contain additional clauses which:

(a) limit the licences to non-commercial use; or

(b) limit the licences to non-commercial use and prohibit the making of adaptations; or

(c) limit the licences to non-commercial use and require third party users to make adaptations available to others on the same terms; or

(d) prohibit the making of adaptations (while allowing commercial redistribution); or

(e) require third party users to make adaptations available to others on the same terms (including allowing commercial use/reuse).

122 All licences are granted on a non-exclusive basis, for the duration of the copyright in the relevant work (unless the licence terms are broken in which case the licence terminates) and for world wide use.

Licences likely to cover vast majority of licensing needs

123 While it is difficult to foresee all possible circumstances in which agencies may wish to licence their copyright material, officials' preliminary view is that the above combinations are likely to accommodate the vast majority of circumstances.

124 Agency feedback is required to confirm this view but the Commission notes that it is consistent with findings in Australia (as to which, see paragraph 82 above).

Recovering statutory or other charges

125 As regards circumstances in which an agency may wish or need to recover statutory charges or other fees from licensees/users, in the Creative Commons context a distinction needs to be drawn between seeking to extract royalties from users, on the one hand, and levying a distribution, statutory or other charge, on the other.

126 All Creative Commons New Zealand law licences state that the licensee is granted a "royalty-free" licence. The non-commercial forms limit this to non-commercial uses of the licensed material, expressly preserving the licensor's right to collect royalties for any use of the Work which results in commercial advantage or private monetary compensation.

127 At the same time, none of the licences precludes an agency from charging users for the distribution of copies of the material. As others have noted, the "royalty-free clause prohibits charging for content, but not for packaging".[76]

128 There are therefore two means by which agencies could charge for their material licensed under a Creative Commons licence:

(a) they could use a non-commercial licence and charge royalties or other fees for any commercial use of their material; or

(b) they could use any of the Creative Commons licences and impose a charge to recover distribution costs or any statutory fee.

129 There does, however, seem to be a significant practical limitation on the second approach, i.e., using any of the Creative Commons licences and imposing a charge to recover distribution costs or any statutory fee. Material licensed under any Creative Commons licence entitles the licensee to distribute the material to others. The licensee could provide copies of the work to downstream recipients, without charge, thereby frustrating any legislative or other charging regime on which an agency might be relying.

130 As regards the first approach, in the context of the GILF Project the Queensland Treasury have developed an interesting use case of how charging for commercial use might work in practice in an online environment.[77]

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[76] See M van Eechoud and B van der Wal "Creative Commons Licensing for Public Sector Information: Opportunities and Pitfalls" (January 2008), pp. 39-40: http://www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report_v3.pdf

Creative Commons Plus (CC+)

131 Where an agency wishes to licence material pursuant to a non-commercial variant of Creative Commons licence, and offer a separate fee-based arrangement for commercial use, it could utilise the recently introduced Creative Commons Plus protocol (also referred to as CCPlus or CC+). As noted on the Creative Commons website:[78]

> "CC+ is a protocol providing a simple way for users to get rights beyond the rights granted by a CC license. For example, a work's Creative Commons license might offer noncommercial rights. With CC+, the license can also provide a link by which a user might secure rights beyond noncommercial rights -- most obviously commercial rights, but also additional permissions or services such as warranty, permission to use without attribution, or even access to performance or physical media.
>
> The CC+ architecture gives businesses a simple way to move between the sharing and commercial economies. CC+ provides a lightweight standard around these best practices and is available for implementation immediately."

132 There are various ways in which CC+ can be implemented, the simplest being the presence of additional graphical or text-based links to the arrangements governing commercial use:[79]

Or, for example:

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My Book by Jon Phillips is licensed under a

<a rel="license" href="http://creativecommons.org/licenses/by-nc/3.0/">Creative Commons
Attribution Non-Commercial 3.0 License</a>.

Permissions beyond the scope of this license may be available at
<a xmlns:cc="http://creativecommons.org/ns#" rel="cc:morePermissions"
href="http://somecompany.com/revenue_sharing_agreement">somecompany.com</a>.
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77 See Queensland Spatial Information Office, Office of Economic and Statistical Research, Queensland Treasury "Government Information and Open Content Licensing: An Access and Use Strategy – Government Information Licensing Framework Project Stage 2" Report (October 2006), p. 68.

78 http://wiki.creativecommons.org/CCPlus See also "CC and CC+ Overview for the World Wide Web" (http://wiki.creativecommons.org/images/c/cb/Ccplus-general.pdf) and "CC+ Technical Implementation for the World Wide Web" (http://wiki.creativecommons.org/images/0/06/Ccplus-technical.pdf).

79 See http://wiki.creativecommons.org/CCPlus#What_is_a_simple_way_of_explaining_CC.2B.3F for further examples. Overseas, services are even beginning to crop up which mediate and facilitate the commercial selling side of the equation; see www.ozmo.com.

The merits of charging

133 The above comments are made without judgement as to whether charging for commercial or other uses of public sector copyright material is desirable or appropriate. The Commission notes that there are arguments that:

(a) charging structures may be inappropriate where the costs of dissemination are low and/or it is economically inefficient to put in place and administer such structures; and

(b) distinguishing between non-commercial and commercial uses may be counter-productive and/or unfair, bearing in mind that the creation of public sector copyright material is often taxpayer-funded, that commercial enterprises are significant taxpayers and that greater national economic benefit may be more likely to flow from allowing free commercial exploitation of government data sources than from private use alone; as the National Library puts it, "[b]oth commercial and non-commercial users should be able to benefit from vital data that can lead to a public good outcome for government".[80]

134 However, assessment of these policy and economic issues, and their opposing counterparts, is beyond the scope of this Discussion Paper. As noted above, further analysis of such issues, taking into account New Zealand conditions, is required and is part of the larger Open Government Information and Data Re-use Project.

Creative Commons and authoritative Crown datasets

135 One New Zealand commentator has questioned whether Creative Commons licences are adequate for authoritative Crown datasets:

(a) which the Crown or other government agency is happy to licence but wishes to ensure are not adapted in any way which would jeopardise their authenticity or original state; but where

(b) third party users are likely to wish to change the format of the datasets to enable them to be utilised or displayed in different media types and on different devices.

136 The example given concerned geospatial data. The concern was that, while a Creative Commons No Derivatives licence might seem appropriate, that licence would not permit the conversion of the data into different formats, such as that required to convert shape files into use for handheld GPS receivers. The commentator considered that the No Derivative form of Creative Commons licence required clarification on this issue.

137 While this concern is understandable, officials disagree with it. Both of the Creative Commons New Zealand law licences that prohibit the making of adaptations (i.e., the Attribution-Noncommercial-No Derivative Works licence (BY-NC-ND) and the Attribution-No Derivative Works licence (BY-ND)) state expressly that the listed licence rights:[81]

> "also include the right to make such modifications as are technically necessary to exercise the rights in other media and formats".

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80 Digital Content Strategy, National Library, August 2007, p. 30: http://www.digitalstrategy.govt.nz/upload/Main%20Sections/Content/NATLIBDigitalContentStrategy.pdf

81 The listed licence rights are to copy the Work, incorporate the Work into one or more Collections, to copy the Work as incorporated in any Collection and to publish, distribute, archive, perform or otherwise disseminate the Work or the Work as incorporated in any Collection.

138 Officials consider that these words necessarily qualify the prohibition in both licences on the 'making of any Adaptations'. While "Adaptation" is defined broadly as "any work created by the editing, modification, adaptation or translation of the Work in any Media", the express and specific allowance in the licences (before the appearance of this prohibition) of 'modifications technically necessary to exercise the rights in other media and formats' can be taken to expressly authorise the likes of format-shifting to enable the material to be reproduced in other media and on different kinds of devices. If the issue were ever to be tested before a court, it is considered that the court would likely decide accordingly.

Creative Commons not a universal licensing solution

139 Despite the resolution of this particular issue, it remains the case that the Creative Commons licence combinations will not cater for all situations in which agencies may wish to licence their copyright material. It is important not to lose sight of that. Comprehensive research undertaken in Australia by the Queensland Treasury suggests that there are various circumstances in which this might be the case. For example, an agency might wish to include terms:[82]

(a) prohibiting a user from on-distributing material to third parties except the user's own consultant;

(b) obliging users not to corrupt or introduce errors into received data, with indemnities for loss in favour of the licensor should that occur;

(c) providing for termination for convenience; or

(d) prescribing fees (within the licence itself) that are payable for access to the material to which the licence relates.

140 The Queensland Treasury research notes that, generally, the terms that continue to be required reflect transactions:[83]

(a) that are highly commercial;

(b) that relate to confidential information or the use of private information (e.g., direct marketing etc);

(c) where time limits apply;

(d) where the ability to terminate a licence is required or where the licence is revocable; or

(e) where an indemnity is required.

141 The Commission does not consider the existence of such circumstances to mitigate against the potential desirability of governmental adoption of Creative Commons licences. No discrete set of licences is likely to cater for all possible scenarios. In the kinds of situation where a Creative Commons licence is not appropriate, a licence agreement tailored to the individual circumstances would be required and could be drafted.

82 See above n 54, paragraph 8.7 and accompanying table.
83 Above n 54, paragraph 8.8.

142 It may be worth repeating, in this context, that Queensland's GILF Project comprises, among other things:

(a) a set of 6 standard licences from the Creative Commons open-content licences which can be applied to the majority of copyright government material; *and*

(b) a restrictive licence for releasing confidential or commercial material in a secure way to authorised parties (e.g., for research or in order to improve government services).

143 The Commission would benefit from hearing the views of State Services agencies and the wider community as to whether there are any additional forms of template licence agreement – beyond the Creative Commons licences – that they would like to see provided, to cater for specific kinds of situation in which the Creative Commons licences may not be appropriate. That would help the Commission to determine whether there are any misapprehensions on the part of agencies or the wider community as to what the Creative Commons licences do and do not allow, and whether there is in fact a strong enough case for drafting any supplementary template licence agreements.

Do the licences provide the Crown or other public sector bodies with sufficient protection from liability?

144 As noted by way of summary in the table above, all of the Creative Commons New Zealand law licences state that:

(a) except as required by law or agreed in writing between the parties, the Work is licensed by the Licensor on an "as is" and "as available" basis without any warranty of any kind, express or implied; and

(b) subject to any liability which may not by law be excluded or limited, the Licensor shall not be liable on any legal basis (including without limitation negligence) and excludes all liability for loss or damage howsoever and whenever caused to the licensee.

145 Commission officials consider that these provisions provide agencies with sufficient and reasonable protection against third party claims. While one might argue that the licences' "Warranties and Disclaimer" and "Limitation of Liability" clauses could be drafted in a more comprehensive manner, they are considered to be sufficiently comprehensive. It is difficult to conceive of a situation in which an agency could be held liable for third party loss for the agency merely having made material, in which it owns the copyright, available for use by way of a Creative Commons licence.

146 It should also be noted that none of the Creative Commons licences includes an indemnity in favour of the Licensor in respect of claims brought against the Licensor by third parties who rely on a licencee's use of the Licensor's licensed material. An example of this factual situation would be where a licensee used the licensed material to provide a product or service to third parties. The licensee may reproduce information from the Licensor which turns out to be inaccurate or it may provide the product or service in a reckless, negligent or misleading manner. In such cases, it is possible that affected third parties might turn to the original Licensor agency for relief.

147 However, while an indemnity would be useful, such cases are likely to be rare. More importantly, the lack of an indemnity provision is not considered to be problematic. The reason for that is because the prospect of such a third party claim against the licensor agency having any teeth is, in the Commission's view, low. In the scenario where a third party chooses to sue the Crown or other government agency, rather than the product or

service provider, on the basis for example of the agency's deeper pockets, one needs to ask what the likely cause of action would be. It would, in all likelihood, be a tortious action in negligence, where the loss suffered is purely economic. The Commission takes the view that it would be difficult for a third party in this scenario to establish a duty of care owed by the agency to the third party, given:

(a) the disclaimer of liability in the Creative Commons licences; and

(b) the heightened "proximity" requirements the courts have developed for situations where a third party seeks to sue in negligence for purely economic loss; in essence, and without getting into the detail, these heightened proximity requirements make it difficult for third parties to sue in negligence for purely economic loss when they are members of an indeterminate group with no special relationship to the defendant.

148 An indemnity could provide greater protection against an agency's legal expenses in the event that someone were to pursue an action through the courts, but given the cost of such proceedings, the prospect of that happening is considered to be low.

149 In the government-licensing context, the Commission considers that it is also worth reflecting on the message that inclusion of a standard indemnity provision in favour of the licensor agency could send to potential users of the copyright material. While it is difficult to make firm predictions without empirical data, one can imagine adverse reactions and a potential chilling effect on certain forms of re-use, for both trust-related and economic reasons.

150 Overall, Commission officials consider that there is sufficient protection in the Creative Commons terms for the Crown and other government agencies to feel comfortable with them from a liability perspective.

Governmental adoption of Creative Commons licences and Part 8 of the Copyright Act

151 When preparing this Discussion Paper, a Commission official was asked whether the use of Creative Commons licences would give rise to an implied indemnity from agencies to end users of the licensed material under section 167 of the Copyright Act (section 167 is within Part 8 of the Act). That, in turn, prompted a chain of inquiry as to:

(a) whether other provisions of Part 8 (sections 147-168) might apply where government agencies licence material under Creative Commons or other standard licences; and

(b) whether governmental adoption of Creative Commons or other standard licences would conflict with the current practices of copyright licensing schemes in New Zealand.

Application of Part 8 to governmental use of Creative Commons or other standard licences

152 Part 8 of the Copyright Act is concerned with copyright licensing schemes and the conduct of licensing bodies. As Brown and Grant explain,[84] its origins can be traced back to the United Kingdom's Gregory Committee Report in 1952 in which that Committee referred to complaints concerning two licensing societies which controlled all

[84] A Brown and A Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989) p. 442. See also Simpson Grierson's "Copyright Tribunal rules on reasonableness of Newspaper Licensing Scheme", Intellectual Property Update, October 2005, available at: http://www.simpsongrierson.com/publications/fyis/fyi-intellectual-property-bron-your-marks/fyi-intellectual-property-brarchives.html. (An update on the appeal of the Tribunal decision referred to in this update can be found in Simpson Grierson's Intellectual Property Update of May 2006 at http://www.simpsongrierson.com/assets/publications/oym/OYM_May2006a.pdf.)

performing rights in music and sound recordings in the UK. Given the large number of copyright owners they represented, the Committee considered that each of these bodies was in a position to act in a "substantially monopolistic" manner and therefore recommended the creation of an independent tribunal to review and revise tariffs in operation under the licensing schemes, to set new tariffs or extend existing tariffs and to determine whether or not refusals to grant licences (or conditions attached to licences issued) were detrimental to the public interest and, if so, to grant licences as of right.

153 Brown and Grant explain that the UK recommendations were considered in New Zealand by the Dalglish Committee which, in turn, recommended the creation of an equivalent tribunal here, to be called the Copyright Tribunal. That Tribunal was then established by the Copyright Act 1962 and it continued in existence under the current Copyright Act 1994 (which replaced the Copyright Act 1962). Part 8 of the current Copyright Act, in turn, draws heavily on the UK's current Copyright, Designs and Patents Act 1988.

154 For the following reasons, Commission officials consider that ordinarily Part 8 of the Copyright Act will not apply to cases of individual agencies licensing public sector copyright material under Creative Commons or other standard licences nor to guidance issued by the Commission or any other department regarding the use, where appropriate, of Creative Commons or other standard licences:

(a) Sections 149 to 155 of the Act:

(i) These sections concern references to the Copyright Tribunal regarding proposed licensing schemes, licensing schemes in operation, and refusals and failures by an operator of a licensing scheme to grant a licence to a person requesting one.

(ii) Section 148 states that those sections apply to four listed types of "licensing scheme". A "licensing scheme", in turn, is a scheme setting out (a) the classes of cases in which the operator of the scheme, or the person on whose behalf the operator acts, is willing to grant copyright licences and (b) the terms on which copyright licences would be granted in those classes of cases (section 2).

(iii) Sections 149 to 155 would not ordinarily apply to cases of a State Services agency licensing a specific work under a Creative Commons or other licence, because the agency will not be operating a "licensing scheme" as defined in section 2 of the Act. Rather than there being a '*scheme* setting out one or more *classes of cases* in which the operator of the *scheme* or the person on whose behalf the operator acts *is willing to grant* copyright licences', ordinarily the agency will be affixing licence terms to specific works in a specific context.

(iv) Similarly, guidance issued by the Commission or any other department regarding the use, where appropriate, of Creative Commons or other standard licences will not be in the nature of such a *scheme.* Among other reasons, the Commission or other department will not be operating a scheme in respect of one or more classes of cases in which the Commission or that other department 'is willing to grant copyright licences'. Rather, the granting of copyright licences will in all likelihood be at the discretion of individual agencies and in specific contexts.

(b) Sections 157 to 160:

(i) These sections concern references to the Copyright Tribunal regarding the terms on which a licensing body proposes to grant a licence, and the expiry of licences which licensees consider unreasonable and in need of extension.

(ii) Section 156 states that these sections apply to four kinds of "licences granted by a licensing body otherwise than under a licensing scheme". "Licensing body", in turn, is defined as "a body of persons (whether corporate or unincorporate) that, as copyright owner or prospective copyright owner or as agent for a copyright owner, (a) negotiates copyright licences, and (b) grants copyright licences, including licences that cover the works of more than one author" (section 2).

(iii) Sections 157 to 160 would not ordinarily apply to cases of a State Services agency licensing a specific work under a Creative Commons or other licence, because the agency will not be a "licensing body". Not only might it be difficult to characterise a single agency as 'a body of persons (whether corporate or unincorporate)', but it is unlikely that an agency is 'negotiating and granting' copyright licences in the sense envisaged by the section 2 definition. The negotiation element, in particular, is likely to be lacking.

(iv) Similarly, neither the Commission nor any other department that issues guidance regarding the use, where appropriate, of Creative Commons or other standard licences, could be considered a "licensing body" because the Commission or that department would not be a body of persons that 'negotiates and grants' copyright licences.

(c) Sections 161 to 166:

(i) These sections concern the factors to be taken into account by the Copyright Tribunal when considering applications or references under Part 8. If sections 149 to 155 and 157 to 160 do not apply to cases of individual agencies licensing copyright public sector material under Creative Commons or other standard licences or to guidance issued by the Commission or any other department regarding the use (where appropriate) of Creative Commons or other standard licences, then these sections are irrelevant in the present context.

(d) Section 167:

(i) Section 167 implies, by operation of law, indemnities into certain schemes and licences for reprographic copying.

(ii) For reasons that flow from the application provisions of subsection (1) of that section, it is most unlikely to apply to cases of individual agencies licensing public sector material under Creative Commons or other standard licences or to guidance issued by the Commission or any other department.

(iii) That subsection states that section 167 only applies to (a) "schemes for licensing reprographic copying" of the listed types of works or editions, and (b) licences granted by licensing bodies for such copying, in both cases "where the scheme or licence does not specify the works to which it

applies with such particularity as to enable licensees to determine whether a work falls within the scheme or licence by inspection of the scheme or licence and the work".

(iv) Section 167 is unlikely to apply to cases of individual agencies licensing public sector material under Creative Commons or other standard licences because:

- as regards the first limb of subsection (1), there will be no "scheme for licensing reprographic copying" of one of the listed types of works or editions, in the sense envisaged by that subsection; rather, there will be the specific application of a given form of licence (whether Creative Commons or otherwise) to a particular work or collection of works;
- similarly, as regards the second limb of the subsection, the licensor agency will not be a "licensing body" negotiating and granting licences for such copying; in particular, the "negotiation" element in the definition of "licensing body" will be absent;
- in any event, even if the above two points were incorrect, both limbs of subsection (1) relate to a situation "where the scheme or licence does not specify the works to which it applies with such particularity as to enable licensees to determine whether a work falls within the scheme or licence by inspection of the scheme or licence and the work"; in virtually all cases, this requirement is unlikely to be met, because the 'scheme' or licence will (and should) identify the work or works to which it relates with sufficient particularity.

(v) Section 167 will not apply to guidance issued by the Commission or any other department regarding the use (where appropriate) of Creative Commons or other standard licences because guidance, of itself, would encompass neither a scheme for licensing reprographic copying of the types of works or editions mentioned in section 167(1) nor the actual granting of licenses by licensing bodies.

(vi) It is also worth noting that, if section 167 were to apply in the circumstances set out above, there would be an apparent conflict between section 65ZC of the Public Finance Act 1989 and section 167, in that the former prohibits departments from granting indemnities whereas section 167 implies them by operation of law.

(e) Section 168 concerns determination by the Copyright Tribunal of equitable remuneration in specified circumstances. It is not relevant to this Discussion Paper.

Whether governmental adoption of Creative Commons or other standard licences would conflict with the current practices of copyright licensing schemes in New Zealand

155 The Commission understands that the two major licensing schemes in New Zealand are Copyright Licensing Limited and Print Media Copyright Agency (a division of NZPA Limited).

156 The Commission also understands that there is no pan-Crown or all-of-government arrangement in place with any such company or agency by which the Crown or wider State Services agencies authorise either company to include Crown and other governmental works within the publication lists covered by the licences they make

available to the public. (It is possible that there are agency-specific arrangements in place (unknown), but the Commission is not aware of any pan-Crown or wider all-of-government arrangement.)

157 The absence of any such express Crown or all-of-government arrangement is significant for a number of reasons:

(a) For the Crown or other government agency's works to be included within a licensing scheme, the operator of the licensing scheme needs the Crown's or the agency's express authorisation prior to inclusion.[85] Such express authorisation can be expected to take the form of an assignment of copyright, a non-exclusive licence with the right to sub-license or some form of agency relationship. There is no onus on the Crown or other government agencies to state on their works that those works *cannot* be included in the licensing scheme's publication list.

(b) It would be inappropriate and unlawful for such licensing schemes to include Crown or other government works within their publication lists without the Crown or relevant agency's authorisation.

(c) The express inclusion of Crown or government works in such circumstances:

(i) could raise copyright infringement issues as well as issues under the Fair Trading Act 1986; and

(ii) prompt some members of the public to pay for a blanket licence from the operator of the licensing scheme, in order to obtain permission to reproduce certain Crown or other government copyright works, when the relevant department or agency may be happy to licence such works to those members of the public at no cost.

(d) The absence of an express authorisation means there is no legal or practical impediment, by reference to the operations of licensing schemes, to all-of-government adoption of Creative Commons or other standard form licences.

158 It may be the case that, for certain types of rights in respect of particular kinds of works, licensing for commercial use under a licensing scheme and, for example, Creative Commons licensing for other uses under a non-commercial licence, could co-exist. However, that is unlikely to be a common occurrence at the government level and is therefore not considered further in this Discussion Paper.

Are the Creative Commons licences sufficiently clear and self-explanatory to encourage uptake?

Key messages readily understandable

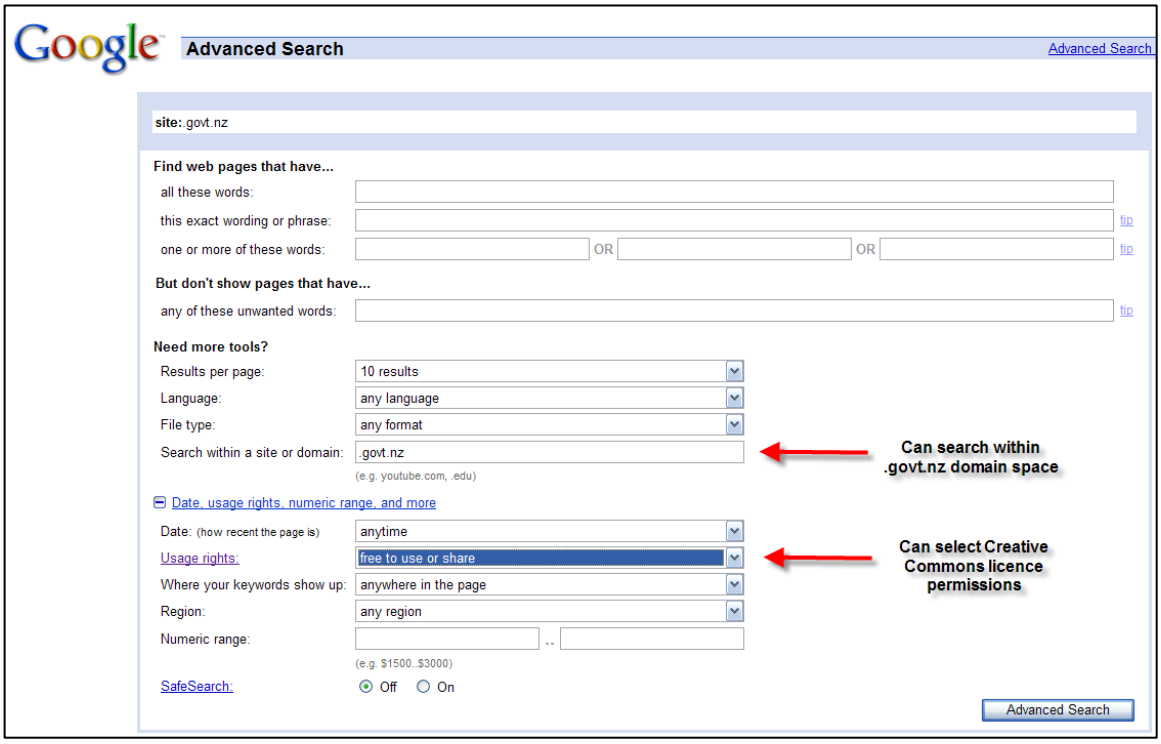
159 Given the existence for each Creative Commons licence of both plain-language summaries and the full legal terms (which themselves are, for the most part, written in modern, plain English legal language), Commission officials consider that the key messages in the licences are readily comprehendible by members of the public, irrespective of whether they have any legal background. That is not to detract from the potential desirability of government-produced online guidance material (e.g., in the nature of a series of FAQs dealing with specific and perhaps unusual issues or

[85] See, for example, H Laddie, P Prescott and M Victoria *The Modern Law of Copyright and Designs* (2nd ed., Butterworths, London, 1995) para 15.1 at p. 659, paras 15.14 and 15.15 at p. 667; K Garnett, J Rayner James and G Davies *Copinger and Skone James on Copyright* (14th ed., Sweet & Maxwell, London, 1999) pp. 1493-1494, 1498-1499 and the discussion of individual collecting societies operating in the UK at pp. 1527-1542.

circumstances), but it is to say that the key features of the licences are readily comprehendible.

Machine-readable translations may bolster uptake

160 In addition, the machine-readable translation of the licences will enable the Commission or other government agencies to develop search tools that are able to identify different kinds of licensed material by reference to their Creative Commons licence type. One can imagine, for example, a tool on www.newzealand.govt.nz which searches the .govt.nz domain space for any Creative Commons-licensed material. Such search facilities are already available with Google, Yahoo and Flickr. Below is a screenshot of the Google search facility, showing a search limited to the .govt.nz domain space and searching for Creative Commons licences allowing free use or sharing:



Desirability of clarity around on-licensing of derivative works

161 There is at least one legal issue on which explanation in accompanying guidance material might be helpful. That issue concerns how an adaptation (derivative work) created with material available under a Creative Commons Attribution (BY) or Attribution-Noncommercial (BY-NC) licence may be on-licensed. Creative Commons Australia highlighted this issue in draft revised licences on which it was consulting. Creative Commons Australia said:[86]

> **"What is the new language in the BY and BY-NC licences?**
>
> The new language in the BY and BY-NC licences is intended to clarify how derivative works can be on-licensed. While the CC licences currently spell out exactly how on-licensing applies to the original work and collections, and how it applies to derivative works under the ShareAlike licences, they are less clear on how derivative works can be licensed where there is no ShareAlike requirement.

86 See "CCau v3.0 Licences - Public Consultation (at last!)" at http://www.creativecommons.org.au/v3draft

> This makes it hard for users to know how they can license derivative works they create with material that is available under the BY and BY-NC licences (ie the two licences that allow derivative works that aren't ShareAlike). You can work out how you are allowed to license such works by applying the basic principles of copyright and contract law - but this doesn't really help non-lawyers. So CC International has a great licensing table on its FAQ page[87] that helps people work out how they can license works incorporating CC material. However, we thought it didn't hurt to include some language in the licence itself.
>
> In line with the CC licensing table, the language we've written up makes it clear that, in the absence of a ShareAlike clause, you are free to license a derivative work incorporating CC material under any licence you like, as long as it is less permissive than the CC licence the original material is under. This is because the derivative work still contains parts of the original work, and you can't pass on rights to those parts that you do not own."

162 The "new language" referred to in an early draft revised Australian Attribution licence, was as follows:

> 2.4 You must:
>
> - Distribute:
>
> …
>
> (b) any Derivative Work only under a licence that has the same or less permissive terms as this Licence. For example, a Derivative Work may be Distributed under a licence which only permits non-commercial uses of the work; however, it may not be Distributed under a licence that does not require Attribution;"

163 The Commission understands that Creative Commons Australia is now minded not to include this additional wording in its revised licences. Nevertheless, this is a useful message, perhaps not readily understood by non-lawyers, which officials suggest be included in guidance material on New Zealand governmental agencies' use of Creative Commons licences, should the Government decide to advocate all-of-government adoption.

Meaning of "Non-Commercial"

164 Another issue on which there is room for debate is the meaning of "Non-Commercial" in the Attribution-Noncommercial (BY-NC), Attribution-Noncommercial-No Derivative Works (BY-NC-ND) and Attribution-Noncommercial-Share Alike (BY-NC-SA) licences.

165 "Non-Commercial" is defined in these licences to mean "not primarily intended for or directed towards commercial advantage or private monetary compensation". Applying that definition in practice is not always straight-forward. Creative Commons is currently reviewing this definition, possibly with a view to amending it.[88] Until such time as that review is complete, there is unlikely to be any real prospect of the Creative Commons New Zealand law licences being amended. The results of the Australian review are expected in early 2009.[89]

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87 See http://tinyurl.com/6455dq

88 See "Creative Commons Launches Study of "Noncommercial Use" (18 September 2008) at http://creativecommons.org/weblog/entry/9557 and "Non-commercial study questionnaire" (25 November 2008) at http://creativecommons.org/weblog/entry/11045.

89 See http://wiki.creativecommons.org/FFAQ

166 Commission officials do not think, however, that this issue should be seen as an impediment to governmental adoption of the Creative Commons licences, particularly if policy principles in accompanying guidance material were to discourage discrimination between commercial and non-commercial use and therefore discourage use of those licences restricted to non-commercial use. In any event, there is nothing to prevent a government agency from releasing material under a non-commercial form of Creative Commons licence together with a statement on the relevant website or document to the effect that if any user is in doubt as to whether a proposed use is "commercial" or "non-commercial", that user should feel free to contact the agency to discuss the issue and seek express approval for the proposed use.

Typographical and other issues

167 There are a few minor typographical and other issues with the Creative Commons New Zealand law licences that should be noted:

(a) On the first page of the Attribution-Noncommercial 3.0 New Zealand (BY-NC) licence, the introductory paragraph explaining the essence of the licence uses the term "Non-commercial". However, "Non-Commercial" is the defined term and should be used in the introductory paragraph. The same issue affects the Attribution-Noncommercial-No Derivative Works 3.0 New Zealand (BY-NC-ND) licence and the Attribution-Noncommercial-Share Alike 3.0 New Zealand (BY-NC-SA) licence. This is a very small point, but one which officials suggest Creative Commons Aotearoa New Zealand should correct during the next licence review life-cycle.

(b) Both the Attribution-Noncommercial-No Derivative Works 3.0 New Zealand (BY-NC-ND) and Attribution-No Derivative Works 3.0 New Zealand (BY-ND) licences state, in their introductory paragraphs, that the licence enables one to "view, edit, modify, translate and distribute Works…" (emphasis added). However, these licences prohibit the making of "Adaptations" and "Adaptation" is defined to mean "any work created by the editing, modification, adaptation or translation of the Work in any media…". There is therefore an internal inconsistency in the licences. It seems clear that the introductory text needs to be changed. This is not considered to be a profound issue, but one which might usefully be touched upon and clarified in accompanying guidance material.

(c) The language used for the "no endorsement" provision in the Creative Commons New Zealand licences is not entirely clear. The relevant wording, used in all the licences, is:

> "You … must not assert or imply *any connection with sponsorship or endorsement by* the Original Author or Licensor of You or Your use of the Work, without the separate, express prior written permission of the Original Author or Licensor"

It is not clear whether the italicised words are intended to mean "any connection with, sponsorship or endorsement by…" (in which the clause would need rewriting to make grammatical sense), or "any connection with sponsorship or any endorsement by…", or "any connection with sponsorship or any connection with endorsement by…", either of which would make grammatical sense but may have *slightly* different meanings. The US and unported versions of the Creative Commons licences both use the phrase "any connection with, sponsorship or

endorsement by…",[90] which suggests that the first option above was intended. This issue is unlikely to create problems in practice, as the general thrust of the clause is clear. However, it is something which officials suggest Creative Commons Aotearoa New Zealand should correct during the next licence review life-cycle.

Would use of any Creative Commons licence be inconsistent with legislation?

168 Commission officials consider that use by New Zealand government agencies of Creative Commons licences would not be inconsistent with any New Zealand legislation that is of general application to agencies. Nevertheless, in the light of views expressed in at least one other jurisdiction, it is worthwhile pausing to consider the potential relevance of the Official Information Act 1982 and the Public Records Act 2005.

Official Information Act

169 A paper by members of the University of Amsterdam's Institute for Information Law, "Creative Commons Licensing for Public Sector Information: Opportunities and Pitfalls" (January 2008),[91] opines that the non-commercial, no-derivative and share-alike forms of the Creative Commons licences are not suitable in the light of the Netherlands' Freedom of Information Act. The paper states:

> "The idea of licensing information seems at odds with the notion that citizens have a right to access such information under the freedom of information act (*Wet openbaarheid van bestuur*). The longstanding debate on the relationship between copyright and freedom of information law, shows that it is generally accepted that gaining access under Wob does not dismiss the recipient of the obligation to respect intellectual property rights in the information. This implies that conditioning use is allowed, at least as long as the terms are consistent with the objective of the Wob: by stimulating openness of government information, enabling citizens to influence and control the administration and participate in the democratic process. The most compatible licenses from this perspective are CC-PD and CC-BY.
>
> Fully compatible with freedom of information law principles is the non-discriminatory and non-exclusive nature of all cc licenses. By contrast, the *non-commercial* clause is not suitable. It is poorly compatible particularly because it restricts use of the work to certain groups, namely private persons and non-profit organisations. If a public sector licenses CC-NC, it excludes all businesses as prospective users, including the media and press and many types of consultancies. Although for these groups separate non-CC licensing schemes could be developed, such co-existing lice[n]sing models may not be desirable in terms of transpar[e]ncy and efficiency. The concept of commercial use currently seems to be interpreted broadly: it encompasses any use with a direct or indirect economic benefit, e.g. posting public sector information on a website with sponsored content (advertising for example) may already be 'commercial use'.
>
> The *share alike* clause is problematic because freedom of information law does not allow a public sector body to impose on citizens the *duty* to share with others, the information that has been communicated to them on the basis of the Wet Openbaarheid van bestuur or other statutes that regulate specific access. We also rate the *non-derivatives* clause as poorly compatible with freedom of information

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90 For a US example, see http://creativecommons.org/licenses/by/3.0/us/legalcode and for an unported example, see http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode

91 Available online at: http://www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report_v3.pdf

> law, because allowing the creation and distribution of derivative information works (e.g. a translating a report, incorporating public sector information from various sources) is more Wob-supportive than merely allowing exact copies to be made."

170 These passages prompt one to ask whether similar conclusions can be drawn in the New Zealand context given this country's Official Information Act 1982 ("OIA") (and, in the case of local government, the Local Government Official Information and Meetings Act 1987).

171 Commission officials consider that the Dutch position that access to information under that country's freedom of information legislation "does not dismiss the recipient of the obligation to respect intellectual property rights in the information", applies equally in New Zealand. In other words, official information in which there is copyright protection, that is released under the OIA, does not lose that copyright protection by virtue of being so released. There is nothing in the Act to this effect. To the contrary, section 48(2) provides (emphasis added):

> "(2) *The making available of, or the giving of access to, any official information in consequence of a request made under this Act shall not be taken, for the purposes of the law relating* to defamation or breach of confidence or *infringement of copyright*, *to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is made available or the access is given*."

172 This clearly indicates that the release of a document under the OIA does not affect any underlying copyright that exists in the document and that the recipient of such a document is not entitled to copy, adapt or distribute such a document in any way that would infringe copyright in the document.

173 By contrast, Commission officials do not believe that the position of the Dutch authors – that the non-commercial, no-derivative and share-alike forms of the Creative Commons licences are not suitable in the light of the Netherlands' Freedom of Information Act – applies in New Zealand under the OIA. The making available of information in an open access way, e.g., on a website, pursuant to a Creative Commons or other form of licence, does not bring the OIA into operation, regardless of the terms of such licence. It might mean that a request for information already published will prompt a simple response along the lines of, "that information can be found on this website at that URL…", but that is a distinctly separate issue. The OIA does not mandate the release of information in the absence of a request and, as discussed above, release of information under the OIA does not entitle the recipient to use the information in any way that would breach any copyright in documents disclosed to that recipient. Licensing of copyright material for re-use is conceptually distinct from mere disclosure.

174 By way of example, one can assume that the State Services Commission decides to release a dataset (which is subject to Crown copyright) pursuant to the Creative Commons Attribution-Noncommercial-No Derivative Works (BY-NC-ND) licence. That dataset could be copied and distributed by anyone but not for commercial purposes and it could not be adapted (i.e., no derivative works could be made on the basis of the dataset). Taking up the concern of the Dutch authors, it would follow that:

(a) no one could alter and repackage the dataset, e.g., for use in a mash-up; and

(b) no organisation could exploit the dataset for a commercial application.

175 Commission officials consider that these outcomes cannot be said to contravene either the letter or spirit of the OIA, because:

(a) in the absence of a request for official information under the OIA, that legislation is not activated; and

(b) in any event, there is nothing in the OIA that entitles a recipient of copyright-protected information under the Act to do anything with it which would breach the copyright.

176 Similarly, if the Commission were instead to make the dataset available pursuant to the Creative Commons Attribution-Share Alike (BY-SA) licence, there is no way in which the imposition of an obligation on licensees to make any adaptations available for use by others (i.e., to share alike), could be said to contravene the OIA. In the absence of such a licence, they would not be entitled to make such adaptations in the first place, regardless of whether they were to obtain the dataset under the OIA.

177 The appropriateness in the New Zealand environment of the non-commercial, no-derivative and share-alike forms of the Creative Commons licences is ultimately a contextual question of mixed fact and policy. The answer is not dictated by the provisions of the OIA. Neither the purposes of the Act as set out in section 4 nor the principle of availability set out in section 5 is concerned with subsequent use of copyright-protected works disclosed either voluntarily or pursuant to a request under the Act. While policy principles in accompanying guidance material might suggest a preference for one or other form of licence (e.g., Attribution) in certain circumstances, there is currently no legislative or other mandate to this effect.[92]

Public Records Act

178 Similarly, Commission officials consider that there is nothing in the Public Records Act 2005 which would be inconsistent with the Creative Commons licensing of, in that context, open access records which members of the public may inspect in accordance with section 47 of that Act.

179 "Open access" record is defined in section 4 as:

(a) a public record:

(i) that has been in existence for at least 25 years or has been transferred to the control of the Chief Archivist; and

(ii) that is classified as an open access record under section 44(2); and

(iii) to which public access has not been prohibited under section 49;

(b) a local authority archive:

(i) that is classified as an open access record under section 46(2); and

(ii) to which public access has not been prohibited under section 49.[93]

180 Returning now to section 47, it states that, unless the Act provides otherwise, "an open access record must be made available for inspection by members of the public free of charge as soon as is reasonably practicable after a request to inspect the record is made to the public office, the local authority, the approved repository, or Archives New Zealand, whichever has possession of the open access record".

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92 Commission officials consider that any such legislative or other mandate would in all likelihood be inappropriate given the various contexts in which and the various extents to which agencies may wish to make copyright material available for re-use.

93 See http://www.legislation.govt.nz/act/public/2005/0040/latest/whole.html#DLM345769 for the text of these individual provisions.

181 Under section 48, the "Chief Archivist may give written authority, on any conditions that the Chief Archivist thinks appropriate, for the publication or copying of a public archive that is an open access record". However, section 57 of the Act makes it clear that the Public Records Act "does not limit the Copyright Act 1994". It follows that, similar to the position under the OIA, neither public access to an open access record nor the mere permission by the Chief Archivist for a person to make a copy of such a record entitles the recipient to further use the record in any way that would infringe any copyright in the record.

182 Archives New Zealand shares this view. Its Continuum Access Standard (S4, revised August 2006) contains a section on "copying and use" which notes:[94]

> "Users should be made aware of the necessity to comply with the provisions of relevant legislation and access conditions when using information from records. In particular, the Copyright Act 1994 applies to many records. The Public Records Act does not affect the application of the Copyright Act.
>
> The Crown holds copyright for 100 years in many of the government records deposited at Archives New Zealand. Crown copyright in these records is generally administered by Archives New Zealand."

183 Similarly, a section on its website entitled "Using Personal Cameras to Copy Archival Records", contains, among others, these paragraphs:[95]

> "***Is the copying of archival records subject to copyright?***
>
> The copying of archival records is subject to copyright. Archives New Zealand can only give copyright clearance to archives under Crown Copyright. This essentially covers all documents created by employees of government departments in the course of their work. If copyright is not held by the Crown you may need to obtain copyright clearance from the individuals concerned or their trustees. It is your responsibility to ensure that copyright is not breached.
>
> ***Can I sell, or make public the digital images I have copied?***
>
> No. Copies are only for private use and study. You cannot on-sell or on-supply any images that you make. You must apply to Archives New Zealand for permission to publish or reproduce any archives that you have copied.
>
> In most instances, Archives New Zealand can give permission to publish records under Crown copyright. You have to apply for this in writing, giving complete archives reference for anything that you wish to publish, including details of the intended published format. Please note that if you wish to publish items to which the Crown does not hold copyright, it is your responsibility to identify and obtain copyright permission from the current copyright holder."

184 The key points, then, are that:

(a) the Public Records Act does not extinguish or otherwise defeat copyright that exists in public records, either generally or upon their transfer to the control of the Chief Archivist; and

(b) there is nothing in that Act to preclude a government agency from licensing material – in which it owns the copyright and which is in its control – pursuant to any of the Creative Commons licences.

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94 http://continuum.archives.govt.nz/files/file/standards/s4/s4-copying.html

95 http://www.archives.govt.nz/doingresearch/researchinfo/camerause.php

Could use of Creative Commons licences alleviate the confusion and criticisms around Crown copyright and current licensing regimes?

185 To recap briefly on the discussion in paragraphs 44-50 of this Discussion Paper, the current problems with Crown copyright and the fragmented approach to licensing of Crown copyright and other copyright material concern:

(a) confusion around the concept of Crown copyright and distinctions between copyright and licensing; and

(b) the proliferation of different and inconsistent licences across government which:

(i) can give rise to confusion among users; and

(ii) impede rather than motivate the re-use and positive exploitation of public sector information.

Confusion regarding Crown copyright

186 Use of Creative Commons licences is unlikely, of itself, to alleviate the confusions that exist in certain sectors of the population as to the nature and effect of Crown copyright. That is not surprising, when:

(a) those issues concern a form of copyright, not the logically subsequent issue of licensing terms; and

(b) the Creative Commons licences were not designed with any such purpose in mind.

187 The confusions around Crown copyright are readily understandable on the basis that:

(a) one cannot expect those with no legal training to understand the intricacies of copyright law, including the concept of Crown copyright; and

(b) there is no readily available explanation of Crown copyright in places where there needs to be such an explanation; for example, there is no such explanation in the Web Standards or on the e-govt website.

Proliferation of inconsistent licences

188 By contrast, adoption by government of the Creative Commons licenses is likely to bring much greater clarity and consistency of approach to the licensing of Crown copyright material and other public sector copyright material. While there would be up to six different licence types to choose from (as well as any additional restrictive licences that might be developed), those licences would become well known as the standard licences pursuant to which Crown and other copyright public sector information might, at an agency's election, be made available for use by the public. Indeed, anecdotal evidence suggests that the licences are already well known within certain circles (e.g., online communities) and are becoming increasingly well known both in New Zealand and internationally and in both public and private sectors.

Multifaceted approach required

189 It follows from the above that adoption by government of the Creative Commons licenses:

(a) is likely to bring greater clarity and consistency of approach to the licensing of governmental copyright material; but

(b) is not likely, of itself, to address the confusions around Crown copyright and licensing.

190 Officials consider the solution would be for the Commission to release guidance material – if and when advocating use of Creative Commons licences (should it ultimately proceed to do so) – which explains, among other things:

(a) the nature of Crown copyright and regular copyright;

(b) those categories of public sector information which are not subject to copyright protection; and

(c) the key differences between the existence of copyright in material and the licensing of such material.

Suggested All-of-government Approach to Opening Up Public Sector Copyright Works for Re-Use

NZGILF and NZGILF Toolkit

191 In the light of the analysis and preliminary conclusions set out in this Discussion Paper, but subject to feedback from agencies and subsequent public consultation, the Commission suggests the following all-of-government approach to opening up public sector copyright material for re-use:

(a) development and promulgation by the Commission of a New Zealand Government Information Licensing Framework ("NZGILF") which would build and expand upon elements of this Discussion Paper; in conjunction with

(b) development and promulgation by the Commission of an "NZGILF Toolkit", by reference to the leading work undertaken by the Queensland GILF Project but taking into account New Zealand conditions, to assist agencies with matters of implementation.

Proposed content of NZGILF

192 The Commission's preliminary view is that the NZGILF would:

(a) contain an overview of the nature of copyright, Crown copyright as a particular species of copyright, the fact that copyright does not exist in certain defined categories of public sector information, and the distinctions between copyright and licensing of copyright material;

(b) contain in- and out of- scope statements that delineate between the kinds of public sector information and data which fall within and outside of the NZGILF and the guidance and recommendations it contains; this would include guidance on the circumstances in which release would be inappropriate, either because the material in question ought not to be publicly released (e.g., where personal information, confidential information or security-sensitive information is at stake) or because a specialised type of licence may be required which is not catered for by NZGILF;

(c) explain traditional versus open access licensing models and the benefits, where appropriate, of releasing public sector copyright material on liberal, open-access terms;

(d) advocate all-of-government adoption of the Creative Commons New Zealand law licences for public sector copyright material that is appropriate for release and re-use, possibly in conjunction with one or more template restricted licences to cater for those situations in which the Creative Commons model is not suitable;

(e) set out overarching and guiding policy principles on information release and re-use, incorporating and building upon aspects of the Queensland GILF Project, the OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information and some of the other international experience traversed in this Discussion Paper; and

(f) explain the various Creative Commons licences (as well as any additional restrictive licences) and those implications of their use which it would be helpful to explain in more detail, from the perspectives of both licensing agencies and users of public sector copyright material, and including coverage of any technical legal issues that might arise in practice of which agencies and users should be aware.

Proposed content of NZGILF Toolkit

193 The Commission's preliminary view is that the NZGILF Toolkit would assist agencies to implement the guidance and recommendations in the NZGILF by providing some or all of:

(a) a textual checklist and a visual flow-chart of legal decision points that need to be considered before licensing any public sector material for re-use with any of the licences included within NZGILF (including consideration of whether given material qualifies for copyright protection in the first place);

(b) a similar checklist and flow-chart of the practical and sometimes commercial issues that need to be considered when deciding between the different Creative Commons licences and any additional restrictive licences that NZGILF may contain; and

(c) broad guidance on matters of technical implementation of an agency's chosen licence.

Nature and scope of NZGILF and NZGILF Toolkit

194 As regards the nature and scope of the NZGILF and NZGILF Toolkit, the Commission's preliminary view is that they would:

(a) be recommendatory and normative in nature, rather than mandatory; and

(b) apply not only to departments but to the wider State Services.

195 Giving the proposed NZGILF and NZGILF Toolkit "recommendatory" status is considered the most appropriate approach at this point, given:

(a) the wide array of circumstances in which differing kinds of public sector material might be made available for re-use;

(b) the discretionary decisions that individual agencies will need to make as to whether certain material ought properly to be released on liberal terms allowing re-use; and

(c) the proposed scope of the NZGILF and NZGILF Toolkit.

Channels for NZGILF and NZGILF Toolkit

196 Subject to feedback on this Discussion Paper, it is anticipated that the NZGILF and NZGILF Toolkit would be produced in electronic form (both PDF and HTML).

197 Further consideration needs to be given, in conjunction with interested stakeholder agencies and Creative Commons Aotearoa New Zealand, to whether the electronic forms would be limited to the production of HTML and PDF versions of the NZGILF and NZGILF Toolkit on the e-government or some other existing website or whether there is

a case for an NZGILF-specific website with more content and greater functionality and, if so, the interrelationship with the existing website of Creative Commons Aotearoa New Zealand.

Other outstanding issues

198 If feedback on the approach suggested in this Discussion Paper is positive, consideration of the following issues will also be required, some of which may be subject to funding:

(a) responsibility for the ongoing management, support and monitoring of the NZGILF and NZGILF Toolkit, taking into account the overlapping interests of the State Services Commission, the Department of Internal Affairs (upon its absorption this year of Government Technology Services), the Ministry of Economic Development (including its business unit, the Intellectual Property Office of New Zealand) and Archives New Zealand;

(b) the future sustainability of Creative Commons Aotearoa New Zealand, whether it requires any government support and, if so, the forms that such support might take;

(c) pricing, charging and other economic issues that arise in the context of greater dissemination and re-use of public sector information;

(d) the potential for creating information asset registers listing details of public sector copyright material that has been licensed for re-use under one or more licences in NZGILF;

(e) whether it would be necessary or desirable to develop any technical solutions to assist agencies in designating that certain content may be re-used in accordance with a specified type of Creative Commons licence;[96]

(f) whether it would be helpful to develop something akin to the UK's Public Sector Information Unlocking Service,[97] a web-based channel to gather and access requests for publication and licensing of public sector information and in more re-usable formats (if an NZGILF-specific website were to be created (see paragraph 197 above), it could also be used for this purpose);

(g) whether complaints mechanisms, beyond those which already exist, are desirable and, if so, what form they should take; and

(h) any other significant issues that arise from feedback on this Discussion Paper.

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96 For example, one can foresee that some agencies may be willing to make certain but not all copyright content on their websites available for re-use. In such instances, the natural inclination might be to include a copyright statement along the lines of either "Creative Commons licensed unless otherwise specified" or "No re-use allowed unless otherwise specified". In both cases, a generic installation of Creative Commons machine-readable code on such a website would not, of itself, properly indicate the extent to which copyright material on the site is available for re-use under Creative Commons terms. One solution would be to develop plugins or widgets for common content management systems ("CMS") which enable one, when entering a new post or content item, to select from a drop-down menu the terms (if any) on which the post or content item may be re-used; the CMS would then automatically insert machine-readable code, probably with the relevant Creative Commons icon (where relevant), at the post or content item level. This would be more granular than the other approaches mentioned above. An example of such an approach is the "Progressive Licence" plugin developed for the WordPress software by US-based Crowd Favourite. That plugin enables Creative Commons or other licensing terms to be added at the post level. It would, however, probably require further development for New Zealand conditions, as currently it only includes the unported versions of Creative Commons licences and one cannot, at this point, turn the licensing on or off within the posting interface (rather, it adds, for every post, the licence type specified in the options page). However, with further development (which is possible as it is licensed under the GPL), such a plugin could enable the various kinds of Creative Commons or other licensing to be applied, or not, for each individual post or content item.

97 http://www.opsi.gov.uk/unlocking-service/

Discussion Questions

Introduction

199 The Commission recognises that:

(a) further input from State Services agencies is required before further development of an NZGILF and NZGILF Toolkit, to ensure, among other things, that:

(i) the proposed Creative Commons licences (possibly in conjunction with one or more additional restrictive licences) sufficiently capture the needs of the wider State Services; and

(ii) any other concerns or interests they may have are taken fully into account;

(b) there is potentially considerable value and learning to be obtained from various communities of interest within New Zealand as to the issues they face regarding the re-use of public sector copyright material, including the formats in which they would like to see it made available and the impact that various charging models might have on their ability to re-use that material, recognising that there may be a subset of circumstances in which charges might be required to meet, for example, the costs of dissemination.[98]

200 As a first step, the Commission is seeking feedback from public service and non-public service departments on the content of this Discussion Paper. The Commission would appreciate feedback on:

(a) the questions below, to the extent they are relevant to a given department; as well as

(b) any general comments that departments may wish to make.

201 As noted above, a subsequent consultation process is planned to obtain the views of both wider State Services agencies and the public.

Administrative matters

202 A four week period has been set for departmental consultation on this Discussion Paper. It is expected that this time will be required for legal and policy advisors to give serious consideration to the questions. The deadline for providing feedback is **24 April 2009.**

203 When providing feedback, please state:

(a) the name of your department; and

(b) phone and email contact details to enable Commission officials to raise any follow-up questions they may have.

A template Microsoft Word document has been provided with this Discussion Paper to assist departments in their provision of feedback.

204 Please forward feedback to [redacted].

[98] The Commission notes that this Discussion Paper itself has benefited from comments made last year on the Commission's blog, *In Development:* http://blog.e.govt.nz

Questions for public service and non-public service departments

1 Has your agency either itself experienced copyright licensing difficulties or received comments or criticisms from the public regarding the licensing of copyright materials? If so, please describe these.

2 Has your agency experienced any difficulty as regards the re-use of material held by other State Services agencies, whether on their websites or otherwise? If so, please describe such difficulty.

3 Have members of your agency shown any interest in Creative Commons or other forms of open access licences? If so, please explain the nature of that interest and the form of licences in question and, if such licences are already in use in your agency, please provide details.

4 Does your agency agree with the views in this Discussion Paper that the current Policy Framework on Government-Held Information and Web Standard 16.5 are no longer adequate to deal with copyright licensing issues that arise in the digital age?

5 Is your agency aware of any international developments or research (e.g., on economic modelling), not addressed in this paper, which would usefully inform the Commission's consideration of open government information and data re-use issues? If so, please provide details.

6 Does your agency currently have any copyright licensing arrangements in place which do not fall within one or more of the three broad categories of licensing arrangements referred to at paragraph 40 of this Discussion Paper? If so, into which additional category or categories would they fall?

7 Does your agency agree with the Commission's preliminary assessment that the Creative Commons New Zealand law licences are the most obvious candidate for all-of-government adoption? If not, why not?

8 Is there any aspect of the Creative Commons model that raises concerns for your agency, whether legally, commercially, culturally, socially, economically or administratively?

9 Is there a need for one or more additional licences addressing specifically the needs and interests of indigenous populations? If so, what are those needs and interests and how does your agency perceive them being accommodated in standard licensing terms?

10 Does your agency have a need for one or more restrictive licences, e.g., for commercially or otherwise sensitive copyright material? If so, please explain, to the extent appropriate, the type of restrictive licence(s) your agency requires. If there is any commercial or other sensitivity around your response that needs to be kept confidential, please make a remark to that effect.

11 If additional licences were required (e.g., restrictive licences or licences addressing specific interests of indigenous populations), does your agency consider it appropriate for the government to advocate both Creative Commons licences as well as additional licences?

12 Is it a matter of concern to your agency that information and data made available under a Creative Commons licence is made available to the world at large, as opposed only to those in or from New Zealand (bearing in mind that New Zealanders benefit from the information and data from other countries made available under Creative Commons or similar open access licences)? If so, what alternative approach would you suggest?

13 Does your agency have any agreements or arrangements in place with copyright licensing schemes such as Copyright Licensing Limited or Print Media Copyright Agency pursuant to which any such scheme is authorised to act as your agency's agent or otherwise represent your agency in the licensing of Crown or other government copyright material?

14 Do you agree with the proposed nature and scope of the NZGILF and NZGILF Toolkit, i.e., that they be recommendatory in nature and encompass the State Services?

15 If the Creative Commons licences were recommended for all-of-government adoption, to which categories or types of information would your agency consider applying them?

16 If the Commission were to advocate all-of-government adoption of the Creative Commons licences, in conjunction with one or more additional licences addressing specific needs, are there any implementation issues you would like to raise that are not anticipated in this Discussion Paper to fall within the expected scope of the NZGILF and NZGILF Toolkit? Would your agency need any additional support?

17 The proposed NZGILF and NZGILF Toolkit are unlikely to extend to software, as it is generally recognised that Creative Commons licences are not appropriate for software which is to be made available on open source terms. To what extent does your agency require separate guidance on the making available of software it owns on open source terms (bearing in mind that the *Guidance on the Treatment of Intellectual Property Rights in ICT Contracts* expressly contemplates retention of ownership in software where the relevant agency may wish to make that software available for re-use on open source terms)?

18 Does your agency have any other comments, not falling within the questions above, arising from this Discussion Paper?

Thank you for taking the time to provide feedback on this Discussion Paper.